

T H E  
T R I A L

O F

*Elizabeth* Duchefs Dowager of *Kingston*

F O R

B I G A M Y,

Before the RIGHT HONOURABLE

The H O U S E of P E E R S,

I N

WESTMINSTER-HALL, in Full PARLIAMENT,

On MONDAY the 15th, TUESDAY the 16th, FRIDAY the 19th,  
SATURDAY the 20th, and MONDAY the 22d of *April*, 1776;  
on the last of which Days the said *Elizabeth* Duchefs Dowager  
of *Kingston* was found Guilty.

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Published by Order of the H O U S E of P E E R S.

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L O N D O N:

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T H E  
T R I A L  
O F

*Elizabeth* Duchefs Dowager of *Kingston*

F O R  
B I G A M Y,

Before the RIGHT HONOURABLE  
The HOUSE of PEERS,  
I N  
WESTMINSTER-HALL, in Full PARLIAMENT.

*Monday, April the 15th, 1776.*

In the Court erected in WESTMINSTER-HALL, for the Trial of  
*ELIZABETH* Duchefs Dowager of *KINGSTON* for BIGAMY.

**A**BOUT Ten of the Clock the Lords came from their own House into the Court erected in *Westminster-Hall*, for the Trial of *Elizabeth* Duchefs Dowager of *Kingston*, in the Manner following:

- The Lord High Steward's Gentlemen Attendants, Two and Two.
- The Clerks Assitant to the House of Lords, and the Clerk of the Parliament.
- Clerk of the Crown in Chancery, bearing the King's Commission to the Lord High Steward, and the Clerk of the Crown in the King's Bench.
- The Masters in Chancery, Two and Two.
- The Judges, Two and Two.
- The Peers eldest Sons, Two and Two.
- Peers Minors, Two and Two.
- Chester* and *Somerset* Heralds.
- Four Serjeants at Arms with their Maces, Two and Two.



The Yeoman Usher of the House.

The Barons, Two and Two, beginning with the youngest Baron.

The Bishops, Two and Two.

The Viscounts and other Peers, Two and Two.

The Lord Privy Seal and Lord President.

The Archbishop of *York* and the Archbishop of *Canterbury*.

Four Serjeants at Arms with their Maces, Two and Two.

The Serjeant at Arms attending the Great Seal, and Purse-Bearer.

Then *Garter* King at Arms, and the Gentleman Usher of the Black Rod carrying the White Staff before the Lord High Steward.

*Henry Earl Bathurst*, Chancellor of *Great Britain*, Lord High Steward, alone, his Train borne.

His Royal Highness the Duke of *Cumberland*, his Train borne.

The Lords being placed in their proper Seats, and the Lord High Steward upon the Woolpack, the House was resumed.

The Clerk of the Crown in Chancery, having his Majesty's Commission to the Lord High Steward in his Hand, and the Clerk of the Crown in the King's Bench, standing before the Clerk's Table with their Faces towards the State, made Three Reverences; the First at the Table, the Second in the Midway, and the Third near the Woolpack; then kneeled down; and the Clerk of the Crown in Chancery, on his Knee, presented the Commission to the Lord High Steward, who delivered the same to the Clerk of the Crown in the King's Bench to read: Then rising, they made Three Reverences, and returned to the Table. And then Proclamation was made for Silence, in this Manner:

*Serjeant at Arms*. Oyez; Oyez, Oyez! Our Sovereign Lord the King strictly charges and commands all Manner of Persons to keep Silence, upon Pain of Imprisonment.

Then the Lord High Steward stood up, and spoke to the Peers.

*Lord High Steward*. His Majesty's Commission is about to be read: Your Lordships are desired to attend to it in the usual Manner; and all others are likewise to stand up uncovered while the Commission is reading.

All the Peers uncovered themselves; and they, and all others, stood up uncovered, while the Commission was read.

## G E O R G E R.

**G**EORGE the Third, by the Grace of God, of *Great Britain, France, and Ireland* King, Defender of the Faith, and so forth. To our Right Trusty and Right Well-beloved Cousin and Counsellor *Henry Earl Bathurst*; our Chancellor of *Great Britain*, greeting. Know ye, That whereas *Elizabeth* the Wife of *Augustus John Hervey*, late of the Parish of *Saint George, Hanover Square*, in our County of *Middlesex*, Esquire, before Our Justices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-street*, in and for Our County of *Middlesex*, upon the Oath of Twelve Jurors, good and lawful Men of the said County of *Middlesex*, then and there sworn and charged to enquire for Us for the Body of the said County, stands indicted of Polygamy and feloniously marrying *Evelyn Pierrepoint* late Duke of *Kingston*, she being then married, and the Wife of the said *Augustus John Hervey*: We, considering that Justice is an excellent Virtue, and pleasing to the Most High, and being willing that the said *Elizabeth*, of and for the Felony whereof she is indicted as aforesaid, before Us, in Our present Parliament, according to the Law and Custom of Our Kingdom of *Great Britain*, may be heard, examined, sentenced, and adjudged; and that all other Things which are necessary in this Behalf may be duly exercised and executed; and for that the Office of High Steward of *Great Britain* (whose Presence in this Behalf is required) is now vacant (as We are informed) We, very much confiding in your Fidelity, Prudence, provident Circumspection, and Industry, have for this Cause ordained and constituted you Steward of *Great Britain*, to hear, execute, and exercise for this Time the said Office, with all Things due and belonging to the same Office in this Behalf: And therefore We command you, that you diligently set about the Premises, and for this Time do exercise and execute with Effect all those Things which belong to the Office of Steward of *Great Britain*, and which are required in this Behalf. In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at *Westminster* the Fifteenth Day of *April*, in the Sixteenth Year of Our Reign.

By the KING Himself, signed with his own Hand.

Y O R K E.

Serjeant



*Serjeant at Arms.* God save the King!

Then *Garter*, and the Gentleman Usher of the Black Rod, after Three Reverences, kneeling, jointly presented the White Staff to his Grace the Lord High Steward: And then his Grace, attended by *Garter*, Black Rod, and the Purse-Bearer (making his proper Reverences towards the Throne) removed from the Woolpack to an armed Chair, which was placed on the uppermost Step but one of the Throne, as it was prepared for that Purpose; and then seated himself in the Chair, and delivered the Staff to the Gentleman Usher of the Black Rod on his Right Hand, the Purse-Bearer holding the Purse on his Left.

*Clerk of the Crown.* Serjeant at Arms, make Proclamation.

*Serjeant at Arms.* Oyez, Oyez, Oyez! Our Sovereign Lord the King strictly charges and commands all Manner of Persons to keep Silence, upon Pain of Imprisonment.

Then the Clerk of the Crown, by Direction of the Lord High Steward, read the *Certiorari*, and the Return thereof, together with the Caption of the Indictment, and the Indictment certified thereupon, against *Elizabeth* Duchess Dowager of *Kingston*; in hæc verba:

**G**EORGE the Third, by the Grace of God, of *Great Britain, France, and Ireland* King, Defender of the Faith, and so forth. To Our Justices of Oyer and Terminer at *Hicks' Hall, in Saint John-street*, in and for Our County of *Middlesex*, and to every of them, greeting. We being willing, for certain Reasons Us thereunto moving, that all and singular Indictments of whatsoever Felonies whereof *Elizabeth* calling herself Duchess Dowager of *Kingston*, by the Name of *Elizabeth* the Wife of *Augustus John Hervey*, late of the Parish of *Saint George, Hanover Square*, in the County of *Middlesex*, Esquire, is indicted before you (as is said) be determined before Us in Our Parliament, and not elsewhere; do command you and every of you, that you or One of you do send under your Seals, or under the Seal of One of you, before Us in Our present Parliament, immediately after the Receipt of this Our Writ, all and singular the Indictments aforesaid, with all Things touching the same, by whatsoever Name the said *Elizabeth* is called in the same, together with this Writ, that We may cause further to be done thereon, what of Right and according to the Law and Custom of *England* We shall see fit to be done. Witness Ourself at *Westminster* the Eleventh Day of *November*, in the Sixteenth Year of our Reign.

Y O R K E.

To the Justices of Oyer and Terminer, at *Hicks' Hall, in Saint John-street*, in and for the County of *Middlesex*, and to every of them, a Writ of *Certiorari* to certify into the Upper House of Parliament the Indictment found against *Elizabeth* calling herself Duchess Dowager of *Kingston*, by the Name of *Elizabeth* Wife of *Augustus John Hervey*, for Bigamy, returnable immediately before the King in Parliament.

Y O R K E.

By Order of the Lords Spiritual and Temporal in Parliament assembled.

The Execution of this Writ appears by the Schedules and Indictment to this Writ annexed.

The Answer of Sir *John Hawkins*, Knight, One of the Justices within written.

*Middlesex.* } **B**E it Remembered, That at the General Session of Oyer and Terminer of Our Lord the King, holden for the County of *Middlesex* at *Hicks' Hall, in Saint John-street*, in the said County, on *Monday* the Ninth Day of *January*, in the Fifteenth Year of the Reign of Our Sovereign Lord *George* the Third, King of *Great Britain*, and so forth, before Sir *John Hawkins*, Knight, *John Cox*, *David Wilmot*, *John Brettell*, Esquires, and Others their Fellows Justices of Our said Lord the King, assigned by His Majesty's Letters Patent under the Great Seal of *Great Britain* directed to same Justices before named, and others in the said Letters named, to inquire more fully the Truth by the Oath of good and lawful Men of the said County of *Middlesex*, and by other Ways, Means, and Methods by which they shall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treasons, Mifprifions of Treason, Infurrections, Rebellions, Counterfeitings, Clippings, Washings, false Coinings, and other Falsties of the Money of *Great Britain* and other Kingdoms and Dominions



Dominions whatsoever, and of all Murthers, Felonies, Manflaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Assemblies, Misprisions, Confederacies, false Allegations, Trespasses, Riots, Routs, Retentions, Escapes, Contempts, Falsties, Negligences, Concealments, Maintenances, Oppressions, Champarties, Deceipts, and all other evil Doings, Offences, and Injuries whatsoever, and also the Accessaries of them, within the County aforesaid (as well within Liberties as without) by whomsoever and in what Manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what Manner, and of all other Articles and Circumstances concerning the Premises, and every of them, or any of them, in any Manner whatsoever, and the said Treasons and other the Premises to hear and determine according to the Laws and Customs of *England*, by the Oath of *John Tilney*, *James Stafford*, *Richard Phillips*, *Samuel Stable*, *Samuel Bird*, *William Hilliar*, *Paul Barbot*, *William Weatherill*, *Thomas Waddell*, *John Williams*, *Samuel Baker*, *Thomas Sberiff*, *John Leicester*, *Thomas Tanton*, *John Goodere*, *John Thomas*, and *Robert Davis*, Gentlemen, good and lawful Men of the County aforesaid, now here sworn and charged to enquire for Our said Lord the King for the Body of the same County; it is presented in Manner and Form as appears by the Indictment and Schedules hereunto annexed.

BUTLER.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and so forth. To Our Justices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-street*, in and for Our County of *Middlesex*, and to every of them, greeting. Whereas by Our Writ We have lately commanded you, and every of you, for certain Reasons, you or One of you should send under your Seals, or the Seal of One of you, before Us at *Westminster*, immediately after the Receipt of that Writ, all and singular Indictments of whatsoever Trespasses, Contempts, and Felonies whereof *Elizabeth* the Wife of *Augustus John Hervey*, Esquire, was indicted before you (as was said) with all Things touching the same, by whatsoever Name the said *Elizabeth* should be called therein, together with the said Writ to you directed, that We might further cause to be done thereon what of Right and according to the Law and Custom of *England* We should see fit to be done: And We do, for certain Reasons Us thereunto moving, command you and every of you, that you or One of you do wholly supersede whatsoever is to be done concerning the Execution of that Our said Writ; and that you proceed to the Determination of the Trespasses, Contempts, and Felonies aforesaid with that Expedition which to you shall seem right and according to the Law and Custom of *England*, notwithstanding Our Writ as before sent to you directed for that Purpose. Witness *William* Lord *Mansfield* at *Westminster*, the Twenty-third Day of *May*, in the Fifteenth Year of Our Reign.

Received 13th June 1775. C. E.

By the Court.

BURROW.

By Rule of Court.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith. To Our Justices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-street*, in and for Our County of *Middlesex*, and to every of them, greeting. We being willing, for certain Reasons, that all and singular Indictments of whatsoever Trespasses, Contempts, and Felonies whereof *Elizabeth* the Wife of *Augustus John Hervey*, Esquire, is indicted before you (as is said) be determined before Us, and not elsewhere, Do command you and every of you, that you or One of you do send under your Seals, or the Seal of One of you, before Us at *Westminster*, immediately after the Receipt of this Our Writ, all and singular the said Indictments, with all Things touching the same, by whatsoever Name the said *Elizabeth* may be called in the same, together with this Our Writ, that We may further cause to be done thereon what of Right and according to the Law and Custom of *England* We shall see fit to be done. Witness *William* Lord *Mansfield* at *Westminster*, the Eighteenth Day of *May*, in the Fifteenth Year of Our Reign.

By the Court.

BURROW.

At the Instance of the within-named Defendant, by Rule of Court.

The Execution of this Writ appears by the Schedules and Indictment to this Writ annexed.

The



The Answer of Sir *John Hawkins*, Knight, One of the Justices within-written.

*Middlesex.* } **B**E it Remembered, That at the General Session of Oyer and Terminer of Our Lord the King, holden for the County of *Middlesex* at *Hicks' Hall*, in *Saint John-street*, in the said County, on *Monday* the Ninth Day of *January*, in the Fifteenth Year of the Reign of our Sovereign Lord *George* the Third, King of *Great Britain*, and so forth, before Sir *John Hawkins*, Knight, Sir *James Esdaile*, Knight, *David Wilmot*, *John Machin*, Esquires, and others their Fellows Justices of Our said Lord the King, assigned by his Majesty's Letters Patent under the Great Seal of *Great Britain* directed to the same Justices before-named, and others in the said Letters named, to inquire more fully the Truth, by the Oath of good and lawful Men of the County of *Middlesex* aforesaid, and by other Ways, Means, and Methods by which they shall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treasons, Misprisions of Treason, Insurrections, Rebellions, Counterfeitings, Clippings, Washings, false Coinings, and other Falsities of the Money of *Great Britain* and other Kingdoms and Dominions whatsoever, and of all Murthers, Felonies, Manslaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Assemblies, Misprisions, Confederacies, false Allegations, Trespaffes, Riots, Routs, Retentions, Escapes, Contempts, Falsities, Negligencies, Concealments, Maintenances, Oppressions, Champarties, Deceits, and all other evil Doings, Offences, and Injuries whatsoever, and also the Accessaries of them, within the County aforesaid (as well within Liberties as without) by whomsoever and in what Manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what Manner, and of all other Articles and Circumstances concerning the Premises and every of them or any of them, in any Manner whatsoever; and the said Treasons and other the Premises to hear and determine according to the Laws and Customs of *England*, by the Oath of *John Tilney*, *James Stafford*, *Richard Phillips*, *Samuel Stable*, *Samuel Bird*, *William Hilliar*, *Paul Barbot*, *William Weatherill*, *Thomas Waddell*, *John Williams*, *Samuel Baker*, *Thomas Sheriff*, *John Leicester*, *Thomas Tanton*, *John Goodere*, *John Thomas*, and *Robert Davis*, Gentlemen, good and lawful Men of the County aforesaid, now here sworn and charged to inquire for Our said Lord the King for the Body of the same County: It is presented in Manner and Form as appears by a certain Bill of Indictment to this Schedule annexed.

BUTLER.

**G**EORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and so forth. To the Sheriff of our County of *Middlesex*, greeting: We command you, that you omit not, by reason of any Liberty in your Bailiwick, but that you take *Elizabeth* the Wife of *Augustus John Hervey*, late of the Parish of *Saint George*, *Hanover Square*, in the County of *Middlesex*, Esquire, if she shall be found in your Bailiwick, and her safely keep, so that you may have her Body before Our Justices assigned by Our Letters Patent under our Great Seal of *Great Britain*, to inquire more fully the Truth, by the Oath of good and lawful Men of our County of *Middlesex* aforesaid, and by other Ways, Means, and Methods by which they shall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treasons, Misprisions of Treason, Insurrections, Rebellions, Counterfeitings, Clippings, Washings, false Coinings, and other Falsities of the Money of *Great Britain* and other Kingdoms and Dominions whatsoever, and of all Murthers, Felonies, Manslaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Assemblies, Misprisions, Confederacies, false Allegations, Trespaffes, Riots, Routs, Retentions, Escapes, Contempts, Falsities, Negligencies, Concealments, Maintenances, Oppressions, Champarties, Deceits, and all other evil Doings, Offences, and Injuries whatsoever, and also the Accessaries of them, within the County aforesaid (as well within Liberties as without) by whomsoever and in what Manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what Manner, and of all other Articles and Circumstances concerning the Premises and every of them or any of them, in any Manner whatsoever; and the said Treasons and other the Premises to hear and determine according to the Laws and Customs of *England*, at the next General Session of Oyer and Terminer to be holden for Our said County, to answer Us concerning certain Felonies whereof she is indicted before our said Justices; and have you then there



this Writ. Witness Sir *John Hawkins*, Knight, at *Hicks' Hall*, the Ninth Day of *January*, in the Fifteenth Year of Our Reign.

BUTLER.

The within-named *Elizabeth* the Wife of *Augustus John Hervey* is not found in my Bailiwick.

The Answer of

*WILLIAM PLOMER*, Esquire, }  
and } Sheriff.  
*JOHN HART*, Esquire, }

**G**EOERGE the Third, by the Grace of God, of *Great Britain, France, and Ireland* King, Defender of the Faith, and so forth. To the Sheriff of Our County of *Middlesex*, greeting: We command you, as before We have commanded you, that you omit not, by reason of any Liberty in your Baliwick, but that you take *Elizabeth* the Wife of *Augustus John Hervey*, late of the Parish of *Saint George, Hanover Square*, in the County of *Middlesex*, Esquire, if she shall be found in your Bailiwick, and her safely keep, so that you have her Body before Our Justices assigned by Our Letters Patent under Our Great Seal of *Great Britain*, to inquire more fully the Truth, by the Oath of good and lawful Men of Our County of *Middlesex* aforesaid, and by other Ways, Means, and Methods by which they shall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treasons, Misprisions of Treason, Insurrections, Rebellions, Counterfeitings, Clippings, Washings, false Coinings, and other Falsties of the Money of *Great Britain*, and other Kingdoms and Dominions whatsoever, and of all Murthers, Felonies, Manlaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Assemblies, Misprisions, Confe-deracies, false Allegations, Trespassies, Riots, Routs, Retentions, Escapes, Contempts, Falsties, Negligencies, Concealments, Maintenances, Oppressions, Champarties, Deceipts, and all other evil Doings, Offences, and Injuries whatsoever, and also the Accessaries of them, within the County aforesaid (as well within Liberties as without) by whomsoever and in what Manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what Manner, and of all other Articles and Circumstances concerning the Premises, and every of them, or any of them, in any Manner whatsoever; and the said Treasons and other the Premises to hear and determine, according to the Laws and Customs of *England*, at the next General Session of Oyer and Terminer to be holden for Our said County, to answer Us concerning certain Felonies whereof she is indicted before Our said Justices; and have you then there this Writ. Witness Sir *John Hawkins*, Knight, at *Hicks' Hall*, the Fourteenth Day of *February*, in the Fifteenth Year of Our Reign.

BUTLER.

The within-named *Elizabeth* the Wife of *Augustus John Hervey*, Esquire, is not found in my Bailiwick.

The Answer of

*WILLIAM PLOMER*, Esquire, }  
and } Sheriff.  
*JOHN HART*, Esquire, }

*Middlesex.* } **T**HE Jurors for Our Sovereign Lord the now King, upon their Oath pre-  
sent, that *Elizabeth* the Wife of *Augustus John Hervey*, late of the Parish  
of *Saint George, Hanover Square*, in the County of *Middlesex*, Esquire, on the Eighth Day  
of *March*, in the Ninth Year of the Reign of Our Sovereign Lord *George* the Third, now  
King of *Great Britain*, and so forth, being then married, and then the Wife of the said  
*Augustus John Hervey*, with Force and Arms at the said Parish of *Saint George, Hanover*  
*Square*, in the said County of *Middlesex*, feloniously did marry and take to Husband *Evelyn*  
*Pierrepoint* Duke of *Kingston* (the said *Augustus John Hervey*, her former Husband, being  
then alive) against the Form of the Statute in such Case made and provided, and against  
the Peace of Our said Lord the King, his Crown and Dignity: And the said Jurors for Our  
said



faid Sovereign Lord the now King, upon their Oath aforefaid further present, that the faid *Elizabeth*, heretofore (to wit) on the Fourth Day of *August*, in the Eighteenth Year of the Reign of Our late Sovereign Lord *George* the Second, late King of *Great Britain*, and so forth, at the Parish of *Lainston*, in the County of *Southampton*, by the Name of *Elizabeth Cbudleigh*, did marry the faid *Augustus John Hervey*, and him the faid *Augustus John Hervey* then and there had for her Husband; and that the faid *Elizabeth* being married, and the Wife of the faid *Augustus John Hervey*, afterwards (to wit) on the Eighth Day of *March*, in the Ninth Year of the Reign of Our faid Sovereign Lord *George* the Third, now King of *Great Britain*, and so forth, with Force and Arms, at the faid Parish of *Saint George, Hanover Square*, in the faid County of *Middlesex*, feloniously did marry and take to Husband the faid *Evelyn Pierrepont* Duke of *Kingston* (the faid *Augustus John Hervey*, her former Husband, being then alive) against the Form of the Statute in such Case made and provided, and against the Peace of Our faid Sovereign Lord the now King, his Crown and Dignity.

O. T.

True Bill.

*Augustine Greenland,*  
*Ann Cradock,*  
*Christopher Dixon,*

*Thomas Dodd,*  
*Samuel Harper,*  
*John Fozard.*

Sworn in Court.

*Lord High Steward.* Is it your Lordships Pleasure, that the Judges have Leave to be covered?

*Lords.* Ay, ay.

*Clerk of the Crown.* Serjeant at Arms, make Proclamation for the Gentleman Usher of the Black Rod to bring his Prisoner to the Bar:

*Serjeant at Arms.* Oyez, Oyez, Oyez! *Elizabeth* Duchefs Dowager of *Kingston*, come forth and save you and your Bail, or else you forfeit your Recognizance.

[*After her Surrender she was, during the Trial, called to the Bar by the following Proclamation.*]

Gentleman Usher of the Black Rod, bring your Prisoner *Elizabeth* Duchefs Dowager of *Kingston* to the Bar, pursuant to the Order of the House of Lords.

Then *Elizabeth* Duchefs Dowager of *Kingston* was brought to the Bar by the Deputy Gentleman Usher of the Black Rod. The Prisoner, when she approached the Bar, made Three Reverences, and then fell upon her Knees at the Bar.

*Lord High Steward.* Madam, you may rise.

The Prisoner then rose up, and curtesied to his Grace the Lord High Steward, and to the House of Peers; which Compliment was returned her by his Grace, and the Lords.

Then, Proclamation having been made again for Silence, the Lord High Steward spake to the Prisoner, as follows.

*Lord High Steward.*

Madam,

YOU stand indicted for having married a Second Husband, your First Husband being living.

A Crime so destructive of the Peace and Happiness of private Families, and so injurious in its Consequences to the Welfare and good Order of Society, that by the Statute Law of this Kingdom it was for many Years (in your Sex) punishable with Death; the Lenity, however, of later Times has substituted a milder Punishment in its Stead.

This Consideration must necessarily tend to lessen the Perturbation of your Spirits upon this awful Occasion.

But that, Madam! which, next to the inward Feelings of your own Conscience, will afford you most Comfort is, reflecting upon the Honour, the Wisdom, and the Candour of this High Court of criminal Jurisdiction.

It is, Madam, by your particular Desire that you now stand at that Bar: You were not brought there by any Prosecutor.

In your Petition to the Lords, praying for a speedy Trial, you assumed the Title of Duchefs Dowager of *Kingston*, and it was by that Title that the Court of King's Bench admitted you to Bail; in your Petition you likewise averred, that *Augustus John Hervey*, whose Wife the Indictment charges you with being, is at this Time Earl of *Bristol*: Upon examining



examining their Records the Lords were satisfied of the Truth of that Averrment; and have accordingly allowed you the Privilege you petitioned for, of being tried by your Peers in full Parliament; and from them you will be sure to meet with nothing but Justice tempered with Humanity.

Before I conclude, I am commanded by the House to acquaint you, Madam, and all other Persons having Occasion to speak to the Court during the Trial, that they are to address themselves to the Lords in general, and not to any Lord in particular.

*Duchefs of Kingston.* My Lords, I, the unfortunate Widow of Your late Brother, the Most Noble *Evelyn Pierrepont* Duke of *Kingston*, am brought to the Bar of this Right Honourable House without a Shadow of Fear, but infinitely awed by the Respect that is due to You, my most Honourable Judges.

My Lords, After having, at the Hazard of my Life, returned from *Rome* in a dangerous Sickness to submit myself to the Laws of my Country, I plead some little Merit in my willing Obedience; and I intreat Your Lordships Indulgence, if I should be deficient in any ceremonial Part of my Conduct towards You, my most Honoured and Respectable Judges: For the Infirmities of my Body and the Oppression of Spirits, under which I labour, leave your unhappy Prisoner sometimes without Recollection; but it must be only with the Loss of Life, that I can be deprived of the Knowledge of the Respect that is due to this high and awful Tribunal.

*Lord High Steward.* Madam, your Ladyship will do well to give Attention, while you are arraigned on your Indictment.

Then Proclamation was made for Silence.

After which *Elizabeth* Duchefs Dowager of *Kingston* was arraigned, in the Form of the said Indictment against her, by the Clerk of the Crown in the King's Bench.

**E**LIZABETH Duchefs Dowager of *Kingston*, you stand indicted by the Name of *Elizabeth* the Wife of *Augustus John Hervey*, late of the Parish of *Saint George, Hanover Square*, Esquire (now become a Peer of this Realm) for that you, on the Eighth Day of *March*, in the Ninth Year of the Reign of his present Majesty Our Sovereign Lord King *George* the Third, being then married, and then the Wife of the said *Augustus John Hervey*, with Force and Arms, at the said Parish of *Saint George, Hanover Square*, in the said County of *Middlesex*, feloniously did marry and take to Husband *Evelyn Pierrepont* Duke of *Kingston*, the said *Augustus John Hervey*, your former Husband, being then alive; against the Form the Statute in such Case made and provided, and against the Peace of Our said Lord the King, his Crown and Dignity.

The Indictment further charges, That you the said *Elizabeth*, heretofore (to wit) on the Fourth Day of *August*, in the Eighteenth Year of Our late Sovereign Lord *George* the Second, late King of *Great Britain*, and so forth, at the Parish of *Lainston*, in the County of *Southampton*, by the Name of *Elizabeth Chudleigh*, did marry the said *Augustus John Hervey*, and him the said *Augustus John Hervey* then and there had for your Husband; and that you the said *Elizabeth*, being married, and the Wife of the said *Augustus John Hervey*, afterwards (to wit) on the Eighth Day of *March*, in the Ninth Year of the Reign of Our said Sovereign Lord *George* the Third, now King of *Great Britain*, and so forth, with Force and Arms, at the said Parish of *Saint George, Hanover Square*, feloniously did marry and take to Husband the said *Evelyn Pierrepont* Duke of *Kingston*, the said *Augustus John Hervey*, your former Husband being then alive.

How say you? Are you guilty of the Felony whereof you stand indicted, or not guilty?

*Duchefs of Kingston.* I *Elizabeth Pierrepont*, Duchefs Dowager of *Kingston*, indicted by the Name of *Elizabeth*, the Wife of *Augustus John Hervey*, Esquire, say, that I am not guilty.

*Clerk of the Crown.* Cul' prit—How will you be tried?

*Duchefs of Kingston.* By God and my Peers.

*Clerk of the Crown.* God send your Grace a good Deliverance.

*Clerk of the Crown.* Serjeant at Arms, make Proclamation.

*Serjeant at Arms.* Oyez, Oyez, Oyez! All manner of Persons that will give Evidence, on Behalf of our Sovereign Lord the King, against *Elizabeth* Duchefs Dowager of *Kingston*, the Prisoner at the Bar, let them come forth, and they shall be heard; for now she stands at the Bar upon her Deliverance.

Lord



*Lord High Steward.* My Lords, the Distance of this Place from the Bar is so great, that I must desire your Lordships Leave to go down to the Table for the Convenience of hearing.

*Lords.* Ay, ay.

Then his Grace removed to the Table.

*Duchess of Kingston.* My Lords, The supposed Marriage in the Indictment with Mr. *Hervey*, which is the Ground of the Charge against me, was insisted upon by him in a Suit instituted by me in the Consistory Court of the Right Reverend Lord Bishop of *London*, by the Sentence of which Court, still in Force, it was pronounced, decreed, and declared, that I was free from all Matrimonial Contracts or Espousals with the said Mr. *Hervey*: And, my Lords, I am advised that this Sentence, which I now desire Leave to offer to your Lordships (remaining unreversed and unimpeached) is conclusive, and that no other Evidence ought to be received or stated to your Lordships respecting such pretended Marriage.

*Lord High Steward.* Do the Counsel for the Prosecutor object to the Reading of the Sentence?

*Mr. Attorney General.* My Lords, Observing that the Prisoner was about to make some Application to your Lordships, I was not solicitous to rise in the Order and Place wherein I ought to have addressed myself to the House; because I would not interrupt, or prevent, any Thing, which she might think material for her to lay before your Lordships.

I attended much to the *Form* of the Application. If I comprehend the Aim of it, she means to object to your Lordships hearing any Evidence, either given or stated, in support of the present Indictment; the Ground of her Objection being a Sentence, said to have passed in the Ecclesiastical Court, against the First Marriage supposed in the Indictment. Upon this, your Lordships have demanded, whether I object to the Reading of the Sentence?

If the Proceeding, referred to, had been tendered to your Lordships in the only Place, which can be thought the proper or regular one, for receiving the Defendant's Evidence, to be sure, many Questions would naturally have arisen upon it. First, Whether *that Proceeding*, explained as it will be, has the Force of a Sentence; or amounts to more than a Circumstance and Proof of the Fraud complained of? Secondly, Whether a *serious* Sentence of that Sort, pronounced between Party and Party, ought to be admitted in a *Criminal Prosecution*, and against the King, who was no Party to it, nor could have become so by any Means? Thirdly, Whether it creates an *Estoppel*, or *conclusive Evidence* against the Crown? Fourthly, Whether it does so in this *peculiar Species of Prosecution*?

But in the Way this Thing is urged, it seems perfectly impossible, or at least altogether premature, to discuss the Force and Effect of it, as Evidence. *That* supposes a Case already made for the Prosecutor, which requires the Aid of Evidence, on the Part of the Prisoner, to disprove, or explain it. But, if I catch the Idea perfectly, the present Insisting is, that the Sentence now offered to the Consideration of your Lordships carries some *legal Force*—what, I do not pretend to define or explain; for I protest I have no Guess what is meant; but—*some legal Force* with it, which enables the Prisoner to demand, in this Stage of the Business, that the Trial shall not proceed, nor any Evidence be heard to maintain the Indictment; but that the whole Matter shall be wound up, and conclude with some Resolution of your Lordships,—not to acquit (for in order to that you must try) but to dismiss the Prisoner, without Trial, after putting herself upon her Peers for Trial.

I have, notwithstanding, shortly intimated the Nature of the Objections, which may be made to it, as an Article of Evidence for the Prisoner; partly to point out, how untenable the Proposition is of stopping the Trial, by interposing a Thing, whose Reality, Competence, and Effect will be so much disputed in Matter of Fact and of Law; but chiefly, to lay in my Claim, that this Paper (if your Lordships should think it worth hearing) may be read *at this Time*, and for the Purpose of the Motion *now* made by the Prisoner *only*, without Prejudice to any Objection, which I may think fit to make to it, if it should be offered as Evidence in the Course of the Trial.

If it be read under the Reserve I have mentioned, not as a Part of the Trial, but to make this Application of the Prisoner to your Lordships, previously to her Trial, intelligible; and for the Sake of raising the Argument upon it, in case your Lordships should suffer such a Point to be argued at all: In these Views, I will not object to the Reading of it.



But if it be offered as a Piece of Evidence for the Prisoner, so that I must admit or object to it *now*, I shall certainly insist upon going on with the Prosecution, and drive this Article of Evidence into its own Place, the Prisoner's Defence. There it will be better seen, how far it is available, or even competent.

Unless I could learn the Purpose of offering it from those who advised it, I do not know how to make a more particular Answer to your Lordships Question.

*Duchess of Kingston.* Will your Lordships please to permit my Counsel to be heard to this Point?

*Lords.* Ay, ay.

*Lord High Steward.* Mr. Wallace, you may proceed for the Prisoner.

*Mr. Wallace.* My Lords, I have the Honour to be assigned one of the Counsel to advise and assist the noble Prisoner at the Bar in all Matters of Law that may arise in the Course of the Trial.

I shall submit with great Deference to your Lordships, that the present Stage of the Business is the proper Season to introduce the Sentence which has been mentioned to the Court.

My Lords, The Sentence is conceived to be conclusive upon the Fact of that Marriage, which is the Ground of this Indictment. The Indictment supposes that the Prisoner at the Bar was married to *Augustus John Hervey*: The Sentence now offered to your Lordships is not on y of a competent Jurisdiction to decide that Question, but the only constitutional Jurisdiction.

My Lords, Whilst this Sentence remains unimpeached, I conceive that it is conclusive against all Evidence to be produced of the Fact of the Marriage. It is in that Light the Prisoner is advised to offer it to your Lordships, that a Court of competent Jurisdiction having decided the Point, it will be in vain to call parole Witnesses to the Fact; and it will only take up your Lordships Time, and it will be of no real Use to state the Evidence of Witnesses, which Witnesses cannot appear to give that Evidence before the Court.

My Lords, The Office of a Counsel in opening the Case to any Court is, as I conceive, to state with Clearness the Evidence that is to be adduced, that the Court may better understand and apply it: Therefore, unless the Evidence is competent, your Lordships will not hear any State of it. This too perhaps may be the Time, though I shall forbear at present to enter into it, to discuss whether the Sentence be admissible; or, if admissible, whether conclusive: But we are now, my Lords, upon the Order of producing this Sentence; and if it has the Effect, which I shall humbly submit in a proper Season to your Lordships that it has, of being absolutely conclusive, then the Evidence, which is now ready to be stated by the Counsel for the Prosecution, ought not to be produced, and of Course ought not to be stated. This is the Light in which the Cause appears to me at this Moment; and I trust your Lordships will concur in Opinion, that if the Sentence has the conclusive Effect, which we are ready to submit to your Lordships it has, it repels all Testimony, and makes it improper therefore to state any. If a Precedent should be thought necessary for what is prayed by the noble Prisoner at the Bar, I beg Leave to refer your Lordships to a Case determined at the Bar of the Court of King's Bench in the Reign of King *William*: It is reported in Mr. Serjeant *Cartbew's* Reports, 225, upon a Trial of an Ejectment. The Question was, if Sir *Robert Carr* was actually married to *Isabella Jones*, by whom he had Issue, and under whom the Plaintiff in that Cause claimed the Estate. The Defendant, by way of Anticipation of the Evidence which the Plaintiff was about to give, moved the Court, that the Plaintiff ought not to be allowed to prove a Marriage between them, because there was a Sentence in the Arches upon a Suit of Jactitation brought against her; by which it was decreed, that there was no Marriage between them, but that they were free from all Matrimonial Contracts and Espousals. The Sentence was then offered in Evidence by the Defendant's Counsel at the Bar to conclude the Plaintiff from any Proof of the Marriage, unless he could shew that the same was repealed: And upon a Debate the Court were all of Opinion that this Sentence, whilst unrepealed, was conclusive against all Matters precedent; and that the Temporal Courts must give Credit to it, until it is reversed; it being a Matter of mere Spiritual Cognizance: And upon this the Plaintiff was nonsuited. Your Lordships may perceive that this Case is applicable to another Part of the Business before your Lordships; but I cite it now merely to shew the Sentence was offered, and received to preclude the Examination of Witnesses; and surely if Witnesses are not admissible, their Testimony ought not to be stated.

*Mr. Attorney General.* My Lords, I do not even now comprehend the Order of Proceeding proposed.



If there be any Thing in the present Motion, considered as proposing a fit Manner of regulating this Trial, or as a Point of general Law; in short, if their Proposition be maintainable at all, I do assure your Lordships, that I am not anxious, or in any Degree desirous, to state a Case to this Audience, which must wound the Sensibility of the Prisoner. This I would avoid, unless public Justice, and the Necessity of the Prosecution, should absolutely require it of me.

If it be possible, on her Part, to make any Ground for stopping the Prosecution in this Manner, I shall be well content to stop here. To me it appears stilly impossible. I stated some general Hints to this Effect when I spoke last.

The learned Counsel, in attempting to make good their Proposition of stopping the Trial in this Stage, have contented themselves with a general Averment, that the Law is with them; and refer to the Manner in which Evidence was received in the particular Case of one Ejection, where no Contradiction or Controversy appears to have been raised among the Counsel about the Nature of the Cause depending, the Sentence produced, or the Parties to both. *Here a great deal is to be previously settled on those Heads.*

I did not imagine the learned Counsel would have stopped so shortly: But if they thought well of the Motion, I expected they would have gone the Length of arguing on it, and of endeavouring to demonstrate the Possibility of winding up the whole Proceeding here, by comparing the Nature of the Sentence, with the whole Compass of the Prosecution, stated with every Degree of imaginable Aggravation.

Your Lordships might easily perceive my Reason for expecting the Argument to take this Course. The Sentence may be read.—Indeed it must be read.—It is the only Ground of the Motion. But unless such is demonstrated to be the Effect of it, your Lordships can take no Order upon it, nor make any Use or Application of it, without hearing the Prosecutor's Case. It is not therefore enough to read the Sentence.

My Reason for troubling your Lordships at all was only to observe, that the Motion concludes against even hearing the Prosecutor; and to submit, according to my humble Duty, to your Lordships, whether that be a Point of Law fit to hear the Prisoner upon by her Counsel. If it be, your Lordships will call upon the learned Counsel, whom you have allowed the Prisoner, to sustain it fully in Argument. Otherwise your Lordships will reject it as inadmissible. All Prosecutions might be stopped in this Manner.

*A Lord.* Does Mr. Attorney General object to the reading of the Sentence?

*Mr. Attorney General.* Subject to the Reservation of my Right to object to it in every Shape, when it shall be offered *in Evidence*: Upon that Ground I do not object to it. I am not now admitting this Sentence to be adduced *in the Course of the Cause*; or as a *Part of the Defence*; to which I shall say, it is incompetent. But I let it in, to ground a Motion anterior to the Hearing of the Cause. In that View, and in that View only, I admit it to be read. Indeed it seems to be offered as a Part of the Counsel's Speech; and I admit it as containing the Whole of the Argument, yet offered, in Support of the Motion.

That your Lordships may understand what is to be made of this Sentence when read, they must read, in their Order, the original Allegation of *Elizabeth Chudleigh*; the Cross-allegation delivered in by Mr. *Hervey*; her Answer; the Articles on which the Proofs were taken; the Depositions; and the Sentence; for thus the Sentence proceeded.

*Lord Mansfield.* They must give in Evidence the whole Sentence.

*(The Sentence only begun to be read.)*

*Mr. Attorney General.* I must trouble your Lordships again.

They are now offering to read the Sentence only, without reading the Allegations of the Parties, their Articles and Proofs. For what Reason I very well comprehend. But I apprehend, that, if a Judgment be read in a Court of Law, they must read the Declaration, Plea, Replication, and all other Matters leading to the Judgment, in order to make it intelligible. Here they would read the Sentence, abstractedly from the Allegations and other Matters, upon which that Sentence proceeded.

*Lord Camden.* I wish to know of the Counsel for the Prisoner, whether they meant to object to the whole Proceedings in the Jactitation Cause being read.

*Mr. Wallace.* I have not, upon the Part of the noble Prisoner, the least Objection, that all the Proceedings should be brought before your Lordships. I conceive that what the Officer has now brought before the Court was what is usually given in Evidence in such Case. I do not recollect any other, in any Case I have found, being produced but the Sentence, which states in short the Proceedings had in that Court; but I understand the Proceedings



are here, and on the Part of the noble Prisoner there is not the least Objection to the Whole being laid before the Court.

The Lords then permitted the following Proceedings in the Jactitation Cause, and the Sentence pronounced in the Ecclesiastical Court, to be read *de bene esse*.

SECOND SESSION. *Michaelmas* Term 1768.

*Chudleigh* against *Hervey*. Libel given the 9th of *November* 1768. *Bishop*.

In the Name of God, Amen, before you the Worshipful *John Bettefworth*, Doctor of Laws, Vicar General of the Right Reverend Father in God *Richard*, by Divine Permission, Lord Bishop of *London*, and Official Principal of the Consistorial Episcopal Court of *London* lawfully constituted, your Surrogate, or any other competent Judge in this Behalf of the Proctor of the Honourable *Elizabeth Chudleigh*, of the Parish of *Saint Margaret, Westminster*, in the County of *Middlesex*, Spinster; against the Honourable *Augustus John Hervey*, of the Parish of *Saint James's, Westminster*, in the County of *Middlesex* and Diocese of *London*, a Bachelor; and against any other Person or Persons lawfully intervening or appearing for him in Judgment before you by way of Complaint, and hereby complaining unto you in this Behalf, doth say, alledge, and in Law articulately propound as follows; that is to say,

I. THAT the said Honourable *Elizabeth Chudleigh* was and is free, and no way engaged in any Matrimonial Contract or Espousals with the said Honourable *Augustus John Hervey*, and for and as a Person free and no way engaged, was and is commonly accounted, reputed, and taken to be amongst her Neighbours, Friends, and familiar Acquaintance; and the Party proponent doth alledge and propound every Thing in this Article contained jointly and severally.

2. That the said Honourable *Augustus John Hervey* sufficiently knowing the Premises, and, notwithstanding the same, did, in the Year of our Lord One thousand Seven hundred and Sixty-three, One thousand Seven hundred and Sixty-four, One thousand Seven hundred and Sixty-five, One thousand Seven hundred and Sixty-six, and One thousand Seven hundred and Sixty-seven, and in the several Months therein concurring, and in this present Year of our Lord One thousand Seven hundred and Sixty-eight, within the Parish of *Saint James, Westminster* aforesaid, and in other Parishes and Places in the Neighbourhood thereof and thereto adjoining, or in all, some, or one of the afore-mentioned Times and Places, in the Presence of several credible Witnesses, falsely and maliciously boast, assert, and report, that he was married to or contracted in Marriage with the aforesaid Honourable *Elizabeth Chudleigh*, whereas in Truth and Fact not any such Marriage was ever solemnized or ever contracted between them; and this was and is true, publick, and notorious; and the Party proponent doth alledge and propound of any other Time or Times and Places as shall appear from the Proofs to be made in this Cause, and as before.

3. That the said Honourable *Augustus John Hervey* hath been oftentimes, or at least Once on the Part and Behalf of the said Honourable *Elizabeth Chudleigh*, and her Friends and Acquaintance, asked and requested, or desired to desist and abstain from his aforesaid pretended false and malicious boasting, asserting, and reporting, as mentioned in the next preceding Article; and the Party proponent doth alledge and propound as before.

4. That the said Honourable *Augustus John Hervey* being as aforesaid asked and requested to cease, desist, and abstain from his aforesaid pretended false and malicious boasting, asserting, and reporting, hath not in the least, nor doth in the least at present, cease, desist, and abstain therefrom, but continually with like Malice and Rashness does constantly, falsely, and maliciously boast, assert, affirm, and report the same, to the great Danger of his Soul's Health, no small Prejudice to the said Honourable *Elizabeth Chudleigh*, and pernicious Example of others; and this was and is true, publick, and notorious; and the Party proponent doth alledge and propound as before.

5. That of all and singular the Premises it was and is, by and on the Part and Behalf of the said Honourable *Elizabeth Chudleigh*, Spinster, thinking herself greatly injured, aggrieved, and disquieted by reason of the aforesaid pretended false and malicious boasting, asserting, and reporting of the said Honourable *Augustus John Hervey*, rightly and duly complained



complained to you the Judge aforesaid, and to this Court, for a fit and meet Remedy to be had and provided in this Behalf; and the Party proponent doth alledge and propound as before.

6. That the said Honourable *Augustus John Hervey* was and is of the Parish of *Saint James, Westminster*, in the County of *Middlesex* and Diocese of *London*, and therefore and by reason of the Premises was and is subject to the Jurisdiction of this Court; and the Party proponent doth alledge and propound as before.

7. That all and singular the Premises were and are true, publick, and notorious, and thereof there was and is a publick Voice, Fame, and Report, and of which legal Proof being made, the Party proponent prays Right and Justice to be effectually done and administered to him and his Party in the Premises; and also that by this Court it may be pronounced, decreed, and declared, that the said Honourable *Elizabeth Chudleigh* at and during all the Times in this Libel mentioned was a Spinster, and free from all Matrimonial Contracts and Espousals with him the said Honourable *Augustus John Hervey*; and that he, notwithstanding the Premises, did, in the Years, Months, and Places in this Libel mentioned, or in some or one of them, falsely and maliciously boast, assert, and report that he was married to or contracted in Marriage with the said Honourable *Elizabeth Chudleigh*; and that he may be enjoined perpetual Silence in the Premises, and obliged and compelled to cease, desist, and abstain from such his aforesaid false and malicious Boastings, Assertions, and Reports for the Future; and that he may be condemned in the Costs made and to be made in this Cause on the Part and Behalf of the said Honourable *Elizabeth Chudleigh*, and compelled to the due and effectual Payment thereof by you or your definitive Sentence or final Decree to be given in this Cause; and further to do and decree in the Premises what shall be lawful in this Behalf, the Party proponent not obliging himself to prove all and singular the Premises, or to the Burthen of a superfluous Proof, against which he protests; and prays, that so far as he shall prove in the Premises, he may obtain in his Petition the Benefit of the Law being always preserved, humbly imploring the Aid of your Office in this Behalf.

ARTH. COLLIER.  
PET. CALVERT.  
WM. WYNNE.

*Hervey against Hervey called Chudleigh. Fountain—Bishop.*

Which Day *Fountain*, in the Name of and as the lawful Proctor of the Right Honourable *Augustus John Hervey*, and as such, and under that Denomination, did, by all Ways and Means which may be most beneficial and effectual for his said Party in this Behalf, and to all Intents and Purposes in Law whatsoever, say, alledge, and in Law articulately propound as follows; to wit:

1. THAT some Time in the Year One thousand Seven hundred and Forty-three, or One thousand Seven hundred and Forty-four, the Right Honourable *Augustus John Hervey*, then the Honourable *Augustus John Hervey*, Esquire, and Son of the Right Honourable *John* late Lord *Hervey*, became acquainted with *Elizabeth Chudleigh*, now *Hervey*, at *Winchester Races*; and the said Honourable *Augustus John Hervey*, Esquire, having conceived a Liking and Affection for the said *Elizabeth Chudleigh*, and being a Batchelor, and a Minor of the Age of Seventeen or Eighteen Years, and free from any Matrimonial Contract, did privately make his Addresses of Love and Courtship to the said *Elizabeth Chudleigh*, who was then also a Minor and a Spinster of the Age of about Eighteen Years, and also free from any Matrimonial Contract; and she the said *Elizabeth Chudleigh*, now *Hervey*, did receive and admit such his Addresses and Courtship, and entertain him as a Suiter to her in the Way of Marriage, but without the Privity or Knowledge of either of their Relations or Friends, excepting her Aunt the late Mrs. *Hanmer*, and they mutually contracted themselves to each other; and the Party proponent doth alledge and propound of any other Time and Place, and of every Thing in this Article contained jointly and severally.

2. That in the said Year One thousand Seven hundred and Forty-four, the said Honourable *Augustus John Hervey*, Esquire, was a Lieutenant in the Navy, and belonged to his Majesty's Ship *Cornwall*, which in *August* One thousand Seven hundred and Forty-four lay at *Portsmouth*; that the said *Elizabeth Chudleigh*, in *July* One thousand Seven hundred and Forty-four, being on a Visit at *John Merrill's*, Esquire, at *Lainston*, in the Parish of *Spar-*



shot, in the County of *Southampton*, with her Aunt *Mrs. Hanmer*, and the said *Augustus John Hervey*, being then on board the said Ship *The Cornwall* at *Portsmouth*, went from thence to the said *Mr. Merrill's* in order to see the said *Elizabeth Chudleigh*; and the said Ship being under sailing Orders for and being soon to depart for the *West Indies*, it was proposed between the said *Augustus John Hervey* and *Mrs. Hanmer*, that they the said *Augustus John Hervey* and *Elizabeth Chudleigh* should be married privately at the said *Mr. Merrill's* House; and accordingly they the said *Augustus John Hervey* and *Elizabeth Chudleigh* were, on or about the Fourth Day of *August* One thousand Seven hundred and Forty-four, in *Mr. Merrill's* House in the Parish of *Sparshot* aforesaid, joined together in Holy Matrimony, about Eleven o'Clock at Night, by the Reverend *Thomas Amis*, since deceased, a Clergyman in Holy Orders, according to the Rites and Ceremonies of the Church of *England*, in the Presence of *Mrs. Hanmer* the Aunt of her the said *Elizabeth Chudleigh*, and *Mr. Mountray*, both since deceased; and were then and there by him the said *Thomas Amis* pronounced for and as lawful Husband and Wife; and the Party Proponent doth alledge and propound as before.

3. That after the said *Augustus John Hervey* and *Elizabeth Chudleigh*, now *Hervey*, were so privately married, they consummated such their Marriage at the said *Mr. Merrill's* House, by having the Carnal Knowledge of each others Bodies, and laying for some time in one and the same Bed naked and alone, but without the Privy or Knowledge of any Part of the Family and Servants of the said *Mr. Merrill*; and the Party proponent doth alledge and propound as before.

4. That the said *Augustus John Hervey*, Esquire, continued at the said *Mr. Merrill's* about Two or Three Days, and then returned to his said Ship *Cornwall*, wherein he in *November* following sailed for the *West Indies*; and that on account of certain Circumstances of his Family it being necessary that the said Marriage should be kept a Secret from every Person, except those before-mentioned, therefore the said *Elizabeth Hervey* continued to go by the Name of *Chudleigh* when she left the said *Mr. Merrill's*, residing at different Places, and passing for a single Person; that the said *Augustus John Hervey*, Esquire, remained in the *West Indies* till the Month of *August* in the Year One thousand Seven hundred and Forty-six, when he sailed for *England*, and landed at *Dover* on or about the Sixteenth of *October* following; that the said *Elizabeth Hervey* at that Time resided in *Conduit-street*, where the said *Augustus John Hervey*, Esquire, went to see her as his Wife several Times, and she received him and acknowledged him to be her Husband, but they did not publickly own their Marriage, or cohabit together as Husband and Wife, and this was and is true; and the Party proponent doth alledge and propound as before.

5. That the said *Augustus John Hervey*, Esquire, on the Twenty-eighth Day of the Month of *November* in the said Year One thousand Seven hundred and Forty-six, went to Sea again, and returned to *England* in the *January* following; that the said *Elizabeth Hervey* otherwise *Chudleigh* at that Time continued in *Conduit-street*; but some Differences arising between them on account of the Conduct of the said *Elizabeth Hervey*, they continued to live separate from each other for the Future; and the said Honourable *Augustus John Hervey* thereupon forebore visiting the said *Elizabeth Hervey*, and some time in the Month of *May* One thousand Seven hundred and Forty-seven sailed for the *Mediterranean* Sea in the Ship called *The Princessa*, and continued abroad till the Month of *December* in the following Year; that from the Time they so continued to live separate as aforesaid to this Time the said *Augustus John Hervey* has never visited the said *Elizabeth Hervey*, and this was and is true; and the Party proponent doth alledge and propound as before.

6. That all and singular the Premises were and are true, publick, and notorious, and therefore there was and is a publick Voice, Fame, and Report, of which legal Proof being made, the Party proponent prays Right and Justice to be administered to him and his Party in the Premises, and that it may be pronounced, that the said Right Honourable *Augustus John Hervey* and *Elizabeth Chudleigh* were and are lawful Man and Wife.

GEO. HARRIS.



Consistory of London, FOURTH SESSION of Michaelmas Term, 6th December 1768.

*Chudleigh* against *Hervey*. Bishop—*Fountain*.

On which Day *Bishop*, in the Name of and as lawful Proctor of the Honourable *Elizabeth Chudleigh*, Spinster, and as such, and under that Denomination, did, by all Ways and Means which may be most beneficial and effectual in this Behalf, and to all Intents and Purposes in Law whatsoever, say, alledge, and articulately propound as follows; to wit:

1. **T**HAT as well before as ever since the pretended Time of the pretended Marriage pleaded and propounded by the Right Honourable *Augustus John Hervey*, the other Party in this Suit, to have been on or about the Fourth of *August* One thousand Seven hundred and Forty-four, the said Honourable *Elizabeth Chudleigh* has always passed as a single Woman, and has always gone, been known, and been addressed by the Name of *Elizabeth Chudleigh*, and by no other, and hath always visited and received Visits as a single Woman, and hath always lived separate and apart from the said Right Honourable *Augustus John Hervey*, without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, and hath not at any Time lived or cohabited with him, or he with her; and this was and is true; and so much the said Right Honourable *Augustus John Hervey* well knows and believes in his Conscience to be true; and the Party proponent doth alledge and propound every Thing in this Article contained jointly and severally.

2. That in the Year of our Lord One thousand Seven hundred and Forty-three the said *Elizabeth Chudleigh* was admitted a Maid of Honour to her Royal Highness the Princess of *Wales*; and on the Death of his Royal Highness the Prince of *Wales*, on or about the Seventeenth *April* One thousand Seven hundred and Fifty-one, re-admitted and continued Maid of Honour to her Royal Highness the Princess Dowager of *Wales*, without any Let or Hindrance of the said Right Honourable *Augustus John Hervey*, and hath during the Whole of the said Time continued and now continues a Maid of Honour to her Royal Highness the Princess Dowager of *Wales*, without any Let or Hindrance of the said Right Honourable *Augustus John Hervey*; and this was and is true; and so much the said Right Honourable *Augustus John Hervey* knows and believes in his Conscience to be true; and the Party proponent doth alledge and propound as before.

3. That in supply of Proof of the Premises mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex Two Certificates, and Copies of the Entries from the Treasurer's Office of the Princess Dowager of *Wales*, marked with the Letters A and B, of the Admission of the said *Elizabeth Chudleigh* as Maid of Honour, and of her Continuance now in such Post, and prays that the same may be here read, and taken as if herein inserted; and doth alledge that the same contain true Copies of the Entries of the said *Elizabeth Chudleigh* as Maid of Honour, and was and is signed by Mr. *William Watts*, Deputy Treasurer to her Royal Highness the Princess Dowager of *Wales*; and that *Elizabeth Chudleigh* therein named, and *Elizabeth Chudleigh* Party in this Suit, was and is one and the same Person and not divers; and the Party proponent doth alledge and propound as before.

4. That in the Year One thousand Seven hundred and Fifty-three the said *Elizabeth Chudleigh*, in her own Name as a Spinster, and without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or his being a Party thereto or any ways concerned therein, took a Lease of the Right Honourable Lord *Berkeley of Stratton* of certain Land in *Hill-street*, in the Parish of *George, Hanover Square*, in the County of *Middlesex*, whereon the said *Elizabeth Chudleigh* caused to be built a House, wherein she continued to live for the Space of Five Years and upwards, and afterwards sold the same to *Hugo Meynell*, Esquire, and received the Money proceeding from the Sale thereof to her own Use; and this was and is true; and the Party proponent doth alledge and propound as before.

5. That in supply of Proof of the Premises mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex the original Lease of the Land aforementioned, dated the Fourteenth of *April* One thousand Seven hundred and Fifty-three, executed by the said Lord *Berkeley* and *John Philips*, who was interested therein, and thereby leased to the said *Elizabeth Chudleigh*, Spinster, her Executors, Administrators, and Assigns, for the Term of Eighty-seven Years, and marked with the Letter C, and prays that the same may be here read, and taken as if herein inserted; and doth alledge that every Thing was so had and done as is therein contained, and that *Elizabeth Chudleigh*, Spinster, therein mentioned, and *Elizabeth Chudleigh*, Spinster, Party in this Cause, was and is one and the same Person and



not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

6. That on the Third Day of *February*, in the Year of our Lord One thousand Seven hundred and Fifty-seven, the said *Elizabeth Chudleigh*, Spinster, was admitted a Copyholder and Tenant to the Dean and Chapter of *Westminster* for the House and Land, or some Part thereof, wherein she now lives, at *Knightsbridge*, in the County of *Middlesex*, in her own then and now Maiden Name of *Elizabeth Chudleigh*, and without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or without his being a Party thereto or any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

7. That in Supply of Proof of the Premises mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a Copy of the Court Roll of the said *Elizabeth Chudleigh's* being admitted Tenant to the Premises mentioned in the next preceding Article, and marked with the Letter D; and that *Elizabeth Chudleigh* therein mentioned, and *Elizabeth Chudleigh* Party in this Cause, was and is one and the same Person and not divers; and the Party proponent doth alledge and propound as before.

8. That in the Year of our Lord One thousand Seven hundred and Sixty-two the said *Elizabeth Chudleigh*, Spinster, transacted Business with *John Butcher* in her own Maiden Name of *Chudleigh*, and took a Lease from the said Mr. *Butcher* of certain Lands situate in the Parish of *Kensington*, in the County of *Middlesex*, and this without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or his being a Party thereto or any ways concerned therein; and in such Lease the said *Elizabeth Chudleigh* was described by the Name of *Elizabeth Chudleigh*; and this was and is true; and the Party proponent doth alledge and propound as before.

9. That in supply of Proof of the Premises mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if therein inserted, the said Lease mentioned in the preceding Article, and marked with the Letter E; and doth alledge that every Thing was so had and done as therein is contained; and that *Elizabeth Chudleigh* therein named, and *Elizabeth Chudleigh*, Spinster, Party in this Cause, was and is one and the same Person and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

10. That Mrs. *Ann Hanmer*, the Aunt of the said *Elizabeth Chudleigh*, Spinster, the Party proponent, and who, in the Second Article of the pretended Allegation admitted on the Part of the said Right Honourable *Augustus John Hervey*, is pretended to have been present at the pretended Marriage pleaded by the said *Augustus John Hervey*, did, in the Year One thousand Seven hundred and Sixty-two, write a Letter with her own Hand to the said *Elizabeth Chudleigh*, Spinster, wherein she addresses her as a single Woman, therein calling her *Dear Mrs. Chudleigh*: And also in or about the Year following did make her Last Will and Testament, and Codicil, the Codicil not dated, but the Will bearing Date the Eleventh Day of *June* One thousand Seven hundred and Sixty-three, and both Will and Codicil, as well as the Letter aforesaid, are of the Hand-writing of the said Mrs. *Ann Hanmer*, and so known to be by Persons who have seen her write and subscribe her Name to Writings, and are well acquainted with her Manner and Character of Hand-writing; and in which Will and Codicil, proved in the Prerogative Court of *Canterbury*, and now remaining in the Registry thereof, the said Mrs. *Hanmer* hath by the Will given a Silver Sugar Urn and Spoon, and by her Codicil hath given and bequeathed a Legacy of One hundred Pounds to the said *Elizabeth Chudleigh*, by the Name and Description of the Honourable Mrs. *Elizabeth Chudleigh*; and this was and is true; and the Party proponent doth alledge and propound as before.

11. That in Supply of Proof of the Premises mentioned in the next preceding Article, the Party propounding doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the said Letter marked with the Letter F, beginning thus; "*Sunning-Hill, August the 14th—62. Dear Mrs. Chudleigh,*" and ending, "*I am, dear Madam, your sincere Wellwisher and humble Servant, A. Hanmer.*" And also doth exhibit a Copy of the said Will and Codicil of the said Mrs. *Hanmer*, marked with Letter G; and doth alledge that Mrs. *Hanmer*, the Aunt of the Party proponent, who wrote the said Letter to the said Mrs. *Chudleigh*, and who made the said Will and Codicil, and Mrs. *Hanmer*, whom the said Right Honourable *Augustus John Hervey* pretends to have been a Witness to his pretended Marriage, was and is one and the same Person and not divers; and that Mrs. *Chudleigh* mentioned in the said Letter, and the Honourable Mrs. *Elizabeth Chudleigh* mentioned in the said Last Will and Codicil, and *Elizabeth Chudleigh*, Spinster, Party in this Cause,



was and is the same Person and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

12. That Mr. *Merrill*, at whose House the said Right Honourable *Augustus John Hervey* hath pleaded the said pretended Marriage to have been solemnized, wrote Two Letters with his own Hand, and sent them by the Post to the said *Elizabeth Chudleigh*, Party in this Cause, wherein he addresseth her as a single Woman, the said Letters being dated *Nov. 1st, 1765*, and *Nov. 3d, 1765*, written in One Sheet of Paper, and superscribed or directed thus; "To the Honourable Mrs. *Elizabeth Chudleigh* at *Chalmington*, near *Dorchester, Dorset*;" and in the Letter of the 3d of *Nov. 1765* are these Words, to wit, "I have added your Christian Name to your Surname in the Direction of this, lest the Word Honourable should not be sufficient to prevent a Blunder, and the Letter should be given to Mrs. *Chudleigh*. I have met with so many and such gross Blunders, that I think I can never enough guard against them." And the Party proponent doth alledge, that by these Words, "should be given to Mrs. *Chudleigh*," was meant Mrs. *Chudleigh* at *Chalmington*, Aunt to the said *Elizabeth Chudleigh*, the Party proponent, at whose House she then was; and this was and is true; and the Party proponent doth alledge and propound as before.

13. That in Supply of Proof of the Premises in the next preceding Article mentioned, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the said Two Letters mentioned in the next preceding Article, the First marked with the Letter H, beginning thus, "*Lainstone, November the 1st, 1765. Dear Madam, Tho' I have nothing particular to write to you upon,*" and ending thus, "*Tho' had I mentioned it to them, Mrs. Kelly's and Mrs. Elstob's would not have been wanting. I am, dear Madam, your most obedient humble Servant, John Merrill;*" and the other Letter, marked with the Letter I, beginning thus, "*November 3d, 1765. Dear Madam, The above as you see was intended to go by the last Post,*" and ending thus, "*that I think I can never enough guard against them. I am, dear Madam, your most obedient humble Servant, John Merrill.*" And the Party proponent doth alledge and propound that the whole Body, Subscriptions, and Superscription of the said Letters were and are of the proper Hand-writing and Subscription of the said *John Merrill*, and so known and believed to be by Persons who are well acquainted with his Manner and Character of Hand-writing and Subscription; and that by the Words, "I have added your Christian Name to your Surname in the Direction of this," was meant and intended the Christian and Surname of *Elizabeth Chudleigh*, the Party in this Suit; and that the Honourable Mrs. *Elizabeth Chudleigh* mentioned in the said Superscription, and the Honourable *Elizabeth Chudleigh*, Party in this Suit, was and is one and the same Person and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

14. That the said Mr. *Merrill* hath also in and by his Last Will and Testament, bearing Date the First Day of *January* One thousand Seven hundred and Sixty-seven, proved in the Prerogative Court of *Canterbury*, and now remaining in the Registry thereof, given and bequeathed a Legacy or Legacies to the said *Elizabeth Chudleigh*, Spinster, Party in this Suit, by her then and now Maiden Name of *Elizabeth Chudleigh*; and this was and is true; and the Party proponent doth alledge and propound as before.

15. That in Supply of the Premises mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a Copy of a Clause of the Will of the said Mr. *Merrill*, marked with the Letter K; and doth alledge that Mr. *Merrill*, at whose House the pretended Marriage pleaded by the said Right Honourable *Augustus John Hervey* is said to have been solemnized, and Mr. *Merrill* who made the said Will, was and is one and the same Person and not divers; and that the Honourable *Elizabeth Chudleigh* mentioned in the said Will, and the Honourable *Elizabeth Chudleigh*, Spinster, Party in this Suit, was and is also one and the same Person and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

16. That in the Year of our Lord One thousand Seven hundred and Sixty-six, the said *Elizabeth Chudleigh* borrowed of Mr. *John Drummond* a Banker at divers Times, on Mortgage and Bond Security, in her own Name, and without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or his being a Party thereto, or his being any ways concerned therein, the Sum of Five thousand One hundred and Sixty Pounds, and gave the said Mr. *Drummond* a Bond for One thousand Pounds, Part thereof, in her then and now Maiden Name of *Elizabeth Chudleigh*, and also mortgaged certain Premises situate in the Manor of *Knightbridge*, in the County of *Middlesex*, in her said then and now Maiden Name of *Elizabeth Chudleigh*, unto the said Mr. *Drummond*, for the Repayment of the Sum of Four thousand One hundred and Sixty Pounds to the said Mr. *Drummond*, as will appear by the Original Bond and Mortgage Deed now in the Custody or Power of the said Mr.



*Drummond*, to which she refers; and the Party proponent doth alledge that *Elizabeth Chudleigh* mentioned in the said Bond and Mortgage Deed, and *Elizabeth Chudleigh*, Spinster, Party in this Suit, was and is one and the same Person, and not divers; and this was and is true; and the Party proponent doth allege and propound as before.

17. That in Supply of Proof of the Premises mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the Counterpart of the said Mortgage Deed, dated the Eighteenth of *April* One thousand Seven hundred and Sixty-six, marked with the Letter L; and doth alledge and propound that the same was and is the Counterpart of the said Mortgage Deed remaining in the Custody or Power of the said Mr. *Drummond*, as mentioned in the next preceding Article; and that *Elizabeth Chudleigh* mentioned in the said Bond and Mortgage Deed, and *Elizabeth Chudleigh*, Spinster, Party in this Suit, was and is the same Person, and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

18. That in the Month of *February* in the Year of our Lord One thousand Seven hundred and Sixty-five, and in the Month of *June* One thousand Seven hundred and Sixty-eight, the said *Elizabeth Chudleigh*, Spinster, borrowed of Mr. *William Field* of the *Inner Temple*, Attorney at Law, several Sums of Money, to the Amount of the Sum of One thousand Nine hundred Pounds or thereabouts, for which she gave to the said Mr. *Field*, as Security, Two Bonds in her own Name of *Elizabeth Chudleigh*, without the Interposition, Let, or Hindrance of the said *Augustus John Hervey*, or without his being Party thereto, or any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

19. That on or about the Twenty-fifth of *February* One thousand Seven hundred and Fifty-six Administration of the Goods, Chattels, and Credits of *Harriot Chudleigh*, late of *Windsor Castle*, in the County of *Berks*, Widow, deceased, the Mother of the said *Elizabeth Chudleigh*, Party in this Suit, was granted to the said *William Field*, as the Attorney and for the Use and Benefit of *Elizabeth Chudleigh*, described in the said Administration, and in the Records of the Prerogative Court of *Canterbury*, by the Name and Description of *Elizabeth Chudleigh*, Spinster, the natural and lawful Daughter, and only Child of the said *Harriot Chudleigh* deceased, without the Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or without his being Party thereto, or any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

20. That in Supply of Proof of the Premises in the next preceding Article mentioned, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a Copy of the Administration Act entered on Record in the said Prerogative Court of *Canterbury*, and signed by the Deputy Registrars of the said Court, or One of them, marked with the Letter M; and doth alledge that *Elizabeth Chudleigh*, Spinster, therein mentioned, and *Elizabeth Chudleigh*, Spinster, Party in this Cause, was and is one and the same Person; and this was and is true; and the Party proponent doth alledge and propound as before.

21. That the said Mr. *William Field*, as the Attorney of the said *Elizabeth Chudleigh*, and by virtue of a Letter of Attorney from her for that Purpose, given in her Name of *Elizabeth Chudleigh* to him, used to receive her Salary as Maid of Honour, without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*; and this was and is true; and the Party proponent doth alledge and propound as before.

22. That on or about the Fifth Day of *May* One thousand Seven hundred and Sixty-six, the said *Elizabeth Chudleigh*, Party in this Suit, presented in her own Name of *Elizabeth Chudleigh*, by virtue of a Presentation signed by her for that Purpose, the Reverend Mr. *John Julian* junior, to the Living of *Hartford*, in the County of *Devon*, who was in virtue of the said Presentation duly instituted and inducted to the said Living, without any Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or his being a Party thereto, or any ways concerned therein; and that this was and is true; and the Party proponent doth alledge and propound as before.

23. That in Supply of the Proof of the Premises mentioned in the said next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, an authentic Copy of the said Presentation marked with the Letter N, signed by the said Reverend *John Julian* to the said Rectory of *Hartford*, signed by *Richard Burn*, Notary Publick, Secretary to the Lord Bishop of *Exeter*, and marked with the Letter O; and doth alledge that *Elizabeth Chudleigh* mentioned in the said Presentation and Certificate, and  
*Elizabeth*



*Elizabeth Chudleigh*, Party in this Cause, was and is one and the same Person, and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

24. That the said *Elizabeth Chudleigh*, for many Years subsequent to the pretended Time of the pretended Marriage aforesaid, kept a current Account of Cash with the Bank of *England* in her Name of *Elizabeth Chudleigh*, and as a single Woman; and also in all common as well as other Occurrences of Buyings and Sellings, and other Money Matters, whenever Occasion happened, the said *Elizabeth Chudleigh*, Spinster, Party in this Suit, hath, as well before as ever since the pretended Time of the pretended Marriage pleaded by the said Right Honourable *Augustus John Hervey*, constantly in her own Name of *Elizabeth Chudleigh*, Spinster, transacted such Business, by paying and receiving Money, giving and taking Receipts for the same, hiring and discharging Servants, and on all other Occasions, without the Interposition, Let, or Hindrance of the said Right Honourable *Augustus John Hervey*, or his being any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

25. That all and singular the Premises were and are true, and so forth.

ARTH. COLLIER.

PET. CALVERT.

WM. WYNNE.

*Chudleigh* against *Hervey*.—Sentence read and promulged the 10th of *February* 1769.

**I**N the Name of God, Amen; We *John Bettefworth*, Doctor of Laws, Vicar General of the Right Reverend Father in God *Richard* by Divine Permission Lord Bishop of *London*, and Official Principal of the Consistorial and Episcopal Court of *London*, having seen, heard, and understood, and fully and maturely discussed the Merits and Circumstances of a certain Cause of Jactitation of Marriage which was lately controverted, and as yet remains undetermined before us in Judgment, between the Honourable *Elizabeth Chudleigh* of the Parish of *Saint Margaret, Westminster*, in the County of *Middlesex*, Spinster, the Party, Agent, and Complainant, of the One Part, and the Right Honourable *Augustus John Hervey* of the Parish of *Saint James, Westminster*, in the County of *Middlesex* and Diocese of *London*, Batchelor, falsely calling himself the Husband of the said Honourable *Elizabeth Chudleigh*, the Party accused and complained of, on the Other Part; and We rightly and duly proceeding therein, and the Parties aforesaid lawfully appearing before Us by their Proctors respectively, and the Proctor of the said Honourable *Elizabeth Chudleigh* praying Sentence to be given and Justice to be done to his Party, and the Proctor of the said Right Honourable *Augustus John Hervey* also earnestly praying Sentence and Justice to be done to his said Party, and We having carefully looked into and duly considered of the whole Proceedings had and done before Us in the said Cause, and observed by Law what ought to be observed in this Behalf, have thought fit and do thus think fit to proceed to the giving and promulging our definitive Sentence or final Decree in this same Cause in Manner and Form following (to wit):

FORASMUCH as by the Acts enacted, alledged, exhibited, propounded, proved, and confessed in this Cause We have found and clearly discovered, that the Proctor of the said Honourable *Elizabeth Chudleigh* hath fully and sufficiently founded and proved his Intention deduced in a certain Libel and Allegation and other Pleadings and Exhibits given in, exhibited, and admitted on her Behalf in this same Cause, and now remaining in the Registry of this Court (which Libel and Allegation and other Pleadings and Exhibits We take and will have taken as if herein repeated and inserted for Us to pronounce as herein after We shall pronounce); and that nothing, at least effectual in Law, hath on the Part and Behalf of the said Right Honourable *Augustus John Hervey* been excepted, deduced, exhibited, propounded, proved, or confessed in this same Cause, which may or ought in any wise to defeat, prejudice, or weaken the Intention of the said Honourable *Elizabeth Chudleigh* deduced as aforesaid; and particularly that the said Right Honourable *Augustus John Hervey* hath totally failed in the Proof of his Allegation given in and admitted in this Cause, whereby he pleaded and propounded a pretended Marriage to have been solemnized between him and the said Honourable *Elizabeth Chudleigh*, Spinster: And therefore We *John Bettefworth*, Doctor of Laws, the Judge aforesaid, first calling upon God and setting him alone before our Eyes, and having heard Counsel in this Cause, Do pronounce, decree, and declare, That the said Honourable *Elizabeth Chudleigh* at and during all the Time



mentioned in the said Libel given in and admitted in this Cause, and now remaining in the Registry of this Court, was and now is a Spinster, and free from all Matrimonial Contracts or Espousals (as far as to us as yet appears) more especially with the said Right Honourable *Augustus John Hervey*; and that the said Right Honourable *Augustus John Hervey*, notwithstanding the Premises, did in the Years and Months libellate wickedly and maliciously boast and publicly assert (though falsely) that he was contracted in Marriage to the said Honourable *Elizabeth Chudleigh*, or that they were joined or contracted together in Matrimony: Wherefore We do pronounce, decree, and declare, that perpetual Silence must and ought to be imposed and enjoined the said Right Honourable *Augustus John Hervey* as to the Premises libellate, which we do impose and enjoin him by these Presents; and We do decree the said Right Honourable *Augustus John Hervey* to be admonished to desist from his boasting and asserting that he was contracted to or joined with the said Honourable *Elizabeth Chudleigh* in Matrimony as aforesaid; and We do also pronounce, decree, and declare, that the said Right Honourable *Augustus John Hervey* ought by Law to be condemned in lawful Expences made or to be made in this Cause on the Part and Behalf of the said Honourable *Elizabeth Chudleigh*, to be paid to the said *Elizabeth Chudleigh* or her Proctor; and accordingly We do condemn him in such Expences, which we tax at and moderate to the Sum of One hundred Pounds of lawful Money of *Great Britain*, besides the Expence of a Monition for Payment on this Behalf by this Our definitive Sentence or final Decree, which We read and promulge by these Presents.

ARTH. COLLIER.  
PET. CALVERT.  
WM. WYNNE.

J. BETTESWORTH.

This Sentence was read, promulged, and given by the within-named the Vicar General and Official Principal on *Friday* the Tenth Day of *February* in the Year of our Lord One thousand Seven hundred and Sixty-nine, in the Dining-room adjoining to the Common-hall of *Dofors Commons*, situate within the Parish of *Saint Benediſt*, near *Paul's Wharf*, *London*, there being then and there present the Witnesses specified in the Acts of Court, which I attest.

MARK HOLMAN, Notary Publick,  
Deputy Register.

Mr. Wallace.

Your Lordships are now possessed of a Sentence given by the Consistory Court of the Bishop of *London* in a Cause instituted there to try a Claim made by Mr. *Hervey* of Marriage with the Noble Prisoner; your Lordships find by that Sentence the Claim examined, and the Decree pronounced upon the Allegations and the Evidence given in the Cause, by which Decree the Noble Prisoner at the Bar is declared free from all Matrimonial Contracts and Espousals with Mr. *Hervey*.

My Lords, The Noble Prisoner by the Indictment is charged, subsequent to this supposed Marriage to Mr. *Hervey*, to have married the late Duke of *Kingston*.

It is for me now to submit to your Lordships, that this Sentence is conclusive as long as it remains in Force, and that of Necessity it must be received in Evidence in all Courts and in all Places where the Subject of that Marriage can become a Matter of Dispute.

My Lords, I don't know any Court which the Constitution of this Kingdom has placed the Decisions of the Rights of Marriage in but the Ecclesiastical: I believe it will not be contended, that the Common Law Courts of this Country have any such original Jurisdiction. Marriages may indeed incidentally come to be discussed and determined in the Courts of Common Law, and in many Cases absolutely necessary to the due Administration of Justice; but, my Lords, it will not be found, that where the proper Forum has given a Decision upon the Point, the Common Law Courts have ever taken upon themselves to examine into the Grounds, or at all question the Validity of that Sentence.

My Lords, As far as we have Books to resort to, we find Instances from the earliest Times down to the present, where the Power of the Ecclesiastical Courts is in Terms recognized by the Common Law Courts, and where their Decisions have been considered as



conclusive upon every Question in which they have Jurisdiction, and especially in Cases like the present, particularly belonging to them.

My Lords, I don't know in the Common Law Courts any Instance where the Legality of Marriage can come directly in Question, that the Courts have decided upon it without referring to the Bishop, the Ordinary of the Place, to certify; unless the Marriage has been decided by a Suit instituted in the Ecclesiastical Courts.

Your Lordships will permit me to refer your Lordships to those Authorities of Law which are to be found in our Books; and by the able Assistance which your Lordships Indulgence has given the Prisoner at the Bar you will more particularly have explained the Nature of the Proceedings in the Ecclesiastical Courts, how far and to what Purposes in those Courts they are conclusive, and where they are open to such Litigation. I shall beg to refer your Lordships to a Case reported by Lord Chief Justice *Coke* in the Fourth Part of his Reports, by the Name of *Bunting* and *Addingshall*: In the 27th Year of the Reign of *Elizabeth*, there was a Marriage between one *Thomas Tweede* and one *Agnes Addingshall*, and subsequent to this Marriage a Person of the Name of *Bunting* libelled against the Wife of *Tweede*, claiming under a Pre-contract, and the Spiritual Court enforced that Contract: Afterwards, on the Death of *Bunting*, a Question arose between the Issue of the Second Marriage and the collateral Relations of *Bunting*, the collateral Relations insisting that the Second Marriage was utterly void, because there had existed a First Marriage, and the Husband living at the Time of the Second.—Another Objection I shall state to your Lordships was, that though it might be conclusive between the Parties, yet *Tweede* the First Husband being no Party to the Suit, nor to the Sentence which dissolved the Marriage between them in the Ecclesiastical Court; it could not affect him, nor indeed any Body but the Parties: The Resolution of the Court was, that he being then *de facto* the Husband, though he was not a Party to the Suit nor in the Ecclesiastical Court, yet the Sentence against the Wife should bind the Husband *de facto*; and “Forasmuch as the Cognizance  
“ of the Right of Marriage belongs to the Ecclesiastical Court, and the same Court  
“ has given Sentence in this Case, the Judges of our Law ought (although it be  
“ against the Reason of our Law) to give Faith and Credit to their Proceedings and  
“ Sentences, and to think that their Proceedings are consonant to the Law of Holy  
“ Church, for *Cuilibet in suo arte perito credendum est*, and so the Issue of the First Marriage  
“ in consequence and upon the Credit of the Sentence were considered as legitimate.” My Lord Chief Justice *Coke* has also reported another Case upon the Subject of Marriage in the 40th Year of Queen *Elizabeth*, which your Lordships will find in the Seventh Part of his Reports, Page 41, by the Name of *Kenn's Case*, which is shortly this:—*Christopher Kenn*, Esquire, married *Elizabeth Stowell*, and had Issue; afterwards the Ecclesiastical Court pronounced a Sentence of Divorce between Mr. *Kenn* and the Lady, who were not of the Age of Consent at the Time of the Marriage, and in consequence of this Sentence he married a Second Wife: The Issue of the First Marriage claiming the Inheritance, exhibited a Bill in the Court of Wards of that Day in order to have the Benefit of the Succession, and offered to prove, that though the Sentence had been given in the Ecclesiastical Court on the Ground of his Father and Mother being within the Age of Consent, yet that they were above the Age of Consent; that in Truth they had cohabited together for Eight or Nine Years, and had Issue of that Marriage; there could be no Doubt, if the Matter was open to Examination, that the First Marriage was effectual: For, in the first Place, the Parties were above the Age of Consent, and if they had been under the Age of Consent, yet their Cohabitation together after that Age, and more especially as they had Issue, would have been sufficient to establish the Marriage: It was argued too that it was open to Examination, because both the Statute and Common Law of the Country take Notice of the Age of Consent, and therefore it was equally competent to a Court of Common Law to examine into the Question: As to an Ecclesiastical Court, it was further urged, that the Question related to an Inheritance of which the Ecclesiastical Court had no Jurisdiction or Controul, and therefore it was a Question properly before a Court of Common Law: But the Court then conceived themselves so far bound by the Decision of the Ecclesiastical Court, though founded on false Suggestion, that they held the Plaintiff in that Cause not intitled to any Relief.

My Lords, I beg Leave to trouble your Lordships with the Words of the Court upon that Subject: After stating the Reasons, the Book proceeds:

But it was resolved by all the Justices (for it was a Reference to the Two Chief Justices, to Two other Justices, to the Chief Baron, and Two other Barons) “That the Sentence  
“ should conclude as long as it remained in Force;” and, my Lords, the Reasons given are, “that the Ecclesiastical Judge has sentenced the Contract and Marriage to be void



“ and of no Effect ; and although they were of the Age of Consent, yet if the original  
 “ Contract was void and of no Effect, then there was just Cause of Divorce ; and if the  
 “ Marriage had been within the Age of Consent, the Ecclesiastical Judge is Judge as well  
 “ of the Assent as of the First Contract, and what shall be a sufficient Assent or not ; and  
 “ although the Ecclesiastical Judge shews the Cause of his Sentence, yet forasmuch as he  
 “ is Judge of the original Matter, that is, of the Lawfulness of the Marriage, We will never  
 “ examine the Cause, whether it be true or false ; for of Things the Cognizance whereof  
 “ belongs to the Ecclesiastical Court, We ought to give Credit to their Sentences, as they  
 “ give to the Judgments in our Courts.”

Your Lordships find here a Case where, according to the Facts stated, there was no Doubt of the Validity of the First Marriage, and of the Legitimacy of the Issue claiming in that Cause ; and if there had been no Sentence of the Ecclesiastical Court, no Doubt could have existed of the Right of Succession : But the Sentence in the Ecclesiastical Court having interposed, the Court of Common Law conceived themselves absolutely bound, nay, that they had no Right to look into the Cause of that Sentence, for it was a Matter originally of Ecclesiastical Jurisdiction, and they must give Faith and Credit to the Sentence of the Ecclesiastical Judge in that Cause : Your Lordships will find that my Lord Chief Justice *Coke* cited a Case so long ago as the 22d of *Edward* the Fourth, where the same Doctrine was laid down in the Ecclesiastical Court having a complete and decisive Jurisdiction upon this Point.

My Lords, These Cases from the Reporter and from the Judges who determined them, the Reporter being one, I take to be of the highest Authority, and acknowledging those Principles which occur frequently in the Books, though not under solemn Decisions, but as the received Opinions of Judges and of Lawyers from the earliest of Times.

My Lords, I did before mention to your Lordships a Case from *Carthew* ; I shall not state it particularly now, but only to the Point which we are now upon, that is, of the Sentence being conclusive.

My Lords, This was not, as supposed in the Argument, a *Nisi Prius* Opinion, which every Judge must give with the Information he carries with him, and without the Assistance of the Rest of the Judges of the Court, but a solemn Decision in Trial at Bar in the Court of *King's Bench* in the Fourth of King *William*, when I think Lord Chief Justice *Holt* presided in that Court ; it was too upon a Sentence of Jactitation of Marriage, which your Lordships have now before you, which was there held to be conclusive Evidence, and that no Testimony whatever ought to be received against it. Your Lordships will take the Words of the Court upon that Occasion : “ Upon the Debate the Court were all of Opinion,  
 “ that this Sentence whilst unrepealed was conclusive against all Matters precedent ; and  
 “ that the Temporal Courts must give Credit to it until it is reversed, being a Matter of  
 “ mere Spiritual Cognizance.”

Your Lordships find, that in the Reign of King *William* that Notion which had from all Time prevailed was as strong as ever, and that the Judges of the Court of *King's Bench* in which it was tried, were all clearly of Opinion, that a Case like the present of Jactitation of Marriage was conclusive upon the Point, till it was reversed or repealed.

My Lords, The same Doctrine is laid down by my Lord Chief Justice *Holt*, who presided at the Trial of this Cause, in a Case reported in *Salkeld*, 290, by the Name of *Blackbam's* Case : It turns upon the Claim of Property in the Goods of a Woman deceased ; the Plaintiff proved the Goods to be in his Possession, and to be taken away by the Defendant ; against this Claim of the Plaintiff the Defendant shewed that these were the Goods of one *Jane Blackbam* in her Life-time, and that the Defendant had taken out Letters of Administration to her, and so was intitled to the Goods ; upon this the Plaintiff proved, that some few days before her Death she was actually married to him ; and in Answer to that it was insisted, that the Spiritual Court had determined the Right to be in the Defendant, for they could not have granted Administration to the Defendant but upon a Supposition that there was no such Marriage, and that this Sentence being a Matter within their Jurisdiction was conclusive, and could not be gainsaid as in Evidence. My Lord Chief Justice *Holt*, who was the Judge sitting at *Nisi Prius*, who determined the Case I last cited, says thus : “ A Matter which has been directly determined by their Sentence cannot be gainsaid ;  
 “ their Sentence is conclusive in such Cases, and no Evidence shall be admitted to prove  
 “ the contrary ; but then it must be in Point directly tried.”

My Lords, The Sentence before your Lordships at present is in a Cause, where the Object of the Prosecution was to question the Claim of Marriage, and where the Marriage is the Point directly tried and determined ; so that according to Lord *Holt's* Opinion, if the Sentence be directly upon the Question, it is so conclusive, that it is not competent for



any Court of Common Law to examine into the Matter, or receive any Evidence to contradict it.

My Lords, These are Cafes as far as have happened in the Courts of Law.

I shall now trouble your Lordships with a Cafe determined in the House of Lords under the Name of *Hatfield* and *Hatfield*: It came on before the House of Lords in the Year 1725. The Cafe, as collected from the printed Cafes of the Times, is thus:—One *Leonard Hatfield* married *Jane Porter*, who had different Names I see assigned her, and by his Will made a Provision for her as his Wife: In *March* 1720 she filed a Bill in the Court of Exchequer in *Ireland*, where the Subject of her Provision lay, against *Leonard Hatfield*, a Son by a former Wife, and against a Trustee, to have the Benefit of the Provision: In *January* following the Defendant, the Son and Heir of her Husband, having discovered that she had been before married to one *Porter*, which *Porter* was then living, he procured a Release of Part of the Provision from *Porter*, and filed a Cross Bill for a Discovery of the Marriage and to stay the Proceedings upon her Bill: In this Cross Bill he questioned her upon her Marriage to *Porter*; she denied that she had ever gone by the Name of *Porter*, but with respect to a Marriage with *Porter*, she pleaded that she ought not to make a Discovery, because it tended to criminate herself; and being an Accusation of Bigamy against her, the Plea by the Rules of the Court of Equity was of course allowed, that Court never compelling Persons to discover on Oath Crimes which may be the Subject of Prosecution against themselves.

My Lords, However by the Plea one pretty plainly discovers, that there was Reason to suppose she was the Wife; indeed she knew it—it was capable of Proof, and would be proved in the Cause.

My Lords, They proceeded to the Examination of the Witnesses, and clear Evidence was given that this Woman was the Wife of *Porter*—*Porter* himself had confessed it in his Answer, and he had stated the Minister and the Witnesses who were present at the Marriage, so that he gave *Hatfield* the Heir at Law an Opportunity of bringing direct Proof of the Marriage from the very Persons present. This Woman, finding that she would be pressed by that Proof, had recourse to the Ecclesiastical Court: She instituted a Suit against this *Porter* of Jactitation of Marriage, pending the Cause; and after Depositions taken, though not published, she got *Porter* over to her Interest; he was willing to defeat that Release which he had given, and therefore he does not enter into Proof, but appears by a Proctor for Form Sake, that a Judgment might pass against him: Upon this the Ecclesiastical Judge decreed, as in all Causes of Jactitation they do where they find that there is no Marriage, that the Party libelling was free from all Matrimonial Contracts and Espousals with *Porter*. In this Cafe *Porter* had given a Release as her Husband, had upon Oath in the Court of Exchequer in *Ireland* stated the Marriage with Precision, even named the Minister and the Witnesses at the Marriage, yet in the Ecclesiastical Court he appears by a Proctor, and has Sentence passed against him, without insisting on the Marriage or any Defence. The Court of Exchequer in *Ireland* received this Sentence as conclusive against the Marriage with *Porter*; they conceived they were bound to give Credit to the Ecclesiastical Court. The Plaintiff in the Cause, knowing in what Manner he had been deceived, that in Truth *Porter* was the Husband of this Woman, appealed to the House of Lords in *England*; the House of Lords here conceived, as the Court of Exchequer had done, that the Matter was determined by a competent Jurisdiction; and yet your Lordships see there was Fraud upon the Face of the Proceedings, if it had been competent to the Court to have entered into that Consideration; but the House of Lords here conceived the Matter at an End whilst the Sentence remained in Force, and the Decree of the Court of Exchequer was affirmed: Upon the Pleading this Sentence, the Court of Exchequer in the First Instance, the House of Lords in the last, proceeded to determine the Matter. It is so taken Notice of by Sir *John Strange* in a Cafe I shall presently mention. It is taken Notice of by a very laborious Compiler of the Law, Mr. *Viner*: Under his Title of Marriage, he mentions the Ground of the Determination thus:—The Legality of Marriage shall never be agitated in Equity, especially after Sentence in the Spiritual Court in a Cause of Jactitation of Marriage, although the Proceedings in the Spiritual Court were only faint and collusive.

My Lords, I take this to be a Cafe of the greatest Authority, a Decision of the House of Peers in this Country, and upon a Point of Jactitation of Marriage, a Sentence of the same Nature with the present before your Lordships.

I shall beg Leave to trouble your Lordships with a Cafe or Two more upon the Subject, which are of more modern Times: One is reported by Sir *John Strange* in the Second Part of his Reports, 960, under the Name of *Clews* and *Bathurst*; the Action was for maliciously procuring the Plaintiff's Wife to exhibit Articles of the Peace against him, and for living with



with her in Adultery : The Plaintiff proved the Marriage by the Parson and a Woman, and also a Consummation; to encounter which the Defendant produced a Sentence of the Consistory Court of *London* in a Cause of Jactitation of Marriage brought by the Woman against the Plaintiff, wherein she was declared free from all Contract, and perpetual Silence imposed upon the Plaintiff; which Sentence was pronounced since the Issue had been joined in the Cause; and the Chief Justice ruled this to be conclusive Evidence till reversed by Appeal; and the Plaintiff was Non-suited. Your Lordships find here was a Cause rightly brought, clear Proof of the Marriage made at the Trial by the Witnesses present, no Doubt of the Fact, but the Production of a Sentence in the Ecclesiastical Court in Disaffirmance of that Marriage; a Sentence of Jactitation; the Chief Justice who tried the Cause considered the Business as concluded; that it was of no Consequence when the Decision was made; if the Moment before the Trial, it was enough, being by a Court having the proper and the sole Jurisdiction of the Matter, and whose Opinion must be decisive; and therefore though the Cause had been brought before any Suit instituted in the Ecclesiastical Court, though there was no Doubt of the Foundation for that Cause, yet the Sentence is permitted to have Effect, and to non-suit that Plaintiff who had been injured in the Manner the Case states.

My Lords, There was too, at the same Sittings, another Case which is reported in the following Page by Sir *John Strange*, of *Da Costa* and *Villa Real*, which was an Action upon a Contract of Marriage, *per Verba de futuro*, brought by the Gentleman against the Lady, who pleaded the usual Plea *Non assumpsit*. When the Plaintiff had opened his Case the Defendant offered in Evidence a Sentence of the Spiritual Court in a Cause of Contract; where the Judge had pronounced against the Suit for a Solemnization in the Face of the Church, and declared Mrs. *Villa Real* free from all Contract; and the Chief Justice held this to be proper and conclusive Evidence; that it was a Cause within their Jurisdiction; that the Nature of the Contract was properly examinable by them; and therefore, as a Point determined, he non-suited the Plaintiff in that Cause, though the Plaintiff there opened, and was ready to have proved, the Fact of the Marriage before the Court; but the Sentence having interposed, the Court conceived they were to pay that Credit which every Court before had done in *Westminster Hall*, which all Judges in every Age had done to the Ecclesiastical Jurisdiction in Cases within their Jurisdiction; and finding himself concluded by that, defeated the Plaintiff of the Effect of this Suit. My Lords, it was in this Case; that the Case of *Hatfield* and *Hatfield* was quoted as an Authority.

My Lords, These are Cases upon the very Points of Marriage, and many of them your Lordships find upon the Effect and Force and Conclusion of a Sentence similar to that now under Consideration, that of a Jactitation Cause. My Lords, this has been more recently and within our own Memory understood to be Law; recognized to the Law, and decided accordingly; it is not long ago since an Action was brought against the Honourable Mr. *Thomas Hervey*, by a Tradesman, to recover a Debt for Necessaries found for his Wife. On that Trial the Marriage was proved to the Satisfaction of the Jury, and the Defendant found liable to pay for those Necessaries. Mr. *Hervey* instituted a Suit in the Consistory Court of the Bishop of *London* of Jactitation, and he was declared free from all Espousals and Contracts of Marriage with the Lady. During the Continuance of this Sentence, though appealed from, another Creditor brought an Action against Mr. *Hervey*; and had to produce in Evidence the same Witnesses, who had proved the Case of the other Creditor before any Sentence had been obtained, and had succeeded; but the learned Chief Justice who tried that Cause, conceived it was not then open to Examination; that though, in the First Instance, when the Cause of the First Creditor came to be discussed, there was no Sentence in the Ecclesiastical Court, and of Necessity the Court of Common Law must decide upon the Marriage; but there had then intervened a Sentence in the Ecclesiastical Court, which, whilst in Force, was conclusive; and of course dismissed the Plaintiff's Claim; and the Intent of that Appeal was to suspend and reverse that Sentence; yet while it stood unreversed it was conclusive, the Fact of Marriage was open to no Examination in any Court whatsoever. This is only an Affirmance of the Principles of the Law, and the Doctrine found in the Determinations of a Thousand Cases which the Books furnish.

My Lords, It is not peculiar to the Case of Marriage, it is the same in other Instances where the Ecclesiastical Courts have the Jurisdiction; it is so in the Probate of Wills, it is in the Granting of Letters of Administration: If a Will is forged, if a Will is fraudulently obtained of a Personal Estate, of which the Ecclesiastical Court has the Jurisdiction; if that Court has granted a Probate, it is not open to a Court of Common Law, it is not open to a Court of Equity to enter into the Fraud made use of in obtaining the Will, or to



the Forgery committed upon a Testator: I shall refer your Lordships to a Case or Two upon that Head: That of *Noel and Wells*, in First *Levinz's Reports* 235, in the 19th of King *Charles* the Second: It was an Action brought by the Executrix of the Husband, and upon the Trial the Plaintiff produced the Probate of the Will in Evidence; the Defendant insisted the Will was forged, and the Chief Justice before whom it was tried was of Opinion, he could not give such Evidence directly against the Seal of the Ordinary, in any Things within his Jurisdiction; upon which a Case was made for the Opinion of the Court, and a Verdict was for the Plaintiff; and the Court held that the Chief Justice at the Trial had done right in rejecting the Evidence of the Forgery, that no such Evidence ought to be given till the Probate was repealed; they might indeed, by proving the Seal of the Ordinary forged, have Relief; but if the Seal of the Ordinary was genuine, then whatever Forgery or Fraud was committed, it was not open to the Examination of a Common Law Court.

My Lords, The same Doctrine is to be found in the Case of *Bransby and Kerrick* and others, which was determined by the House of Lords; it was stated in that Case, that One *Robert Bransby*, the Complainant's Son, being intitled to the Reversion of a Freehold and Copyhold Estate expectant upon the Death of the Complainant, made his Will, by which he gave all his Real and Personal Estate to the Defendant *Kerrick*, and made him his Executor, who proved the Will in the Ecclesiastical Court, in common Form; afterwards, in a Contest in the Ecclesiastical Court touching the Validity of that Will, a Sentence was given in favour of the Will in the Year 1716. *Bransby*, the Father, filed a Bill in Chancery, to set aside the Will for Fraud and Imposition; Witnesses were examined, and many Acts and Circumstances of Imposition were proved upon the Defendant. The Cause came to be heard before Lord *Macclesfield* then Chancellor; upon the 14th of *November* 1718, when his Lordship, struck with the monstrous Fraud and Iniquity of the Transaction, declared the Executor should stand as a Trustee for the next of Kin. Upon Appeal the House of Lords reversed the Decree, upon the Ground that it was not competent to a Court of Equity to examine into Fraud and Imposition in a Will touching Personal Estate; that the Court of Ecclesiastical Jurisdiction had decided that Point; that it was no longer open to Discussion.

My Lords, The same Rules obtain with respect to every Court of competent Jurisdiction whether foreign or domestick; we give Credit to the Decisions of all foreign Courts in Points within their proper Jurisdiction; and do not examine into the Facts, but are concluded by the Sentence. I will only refer your Lordships to a Case in Sir *Thomas Raymond's Reports* 473; in the War between the *Dutch* and the *French* in the Time of *Charles* the Second, a Ship was seized by the *French* as a *Dutch* Ship, and condemned; the Ship being in Truth *English*, the Purchaser, under the *French* Condemnation, brought the Ship into *England*, where the Right Owner seized her: Upon this an Action was brought by the Purchaser under the Condemnation; the Defendant, the original Owner, offered to prove his Property, and that the Ship was never a *Dutch* Ship, nor was liable to be taken and condemned by the *French*; but what said the Court? We must give Credit to the Condemnation of the Court in *France*, we are forced to give Credit to and believe that this Ship was in the Condition of a *Dutch* Ship, and subject to a Condemnation; and upon the Ground, that if a Court of competent Jurisdiction gives a Sentence, all other Courts must be bound by it, the *Englishman* was precluded from asserting his Right. It was the same upon a Case of an Insurance, which will occur to some of your Lordships, where the Ship was warranted *Swedish*, and condemned in the War between *England* and *France*; the Parties were concluded from insisting that the Ship is any longer *Swedish* or a Neutral, because a Court of competent Jurisdiction had decided the Matter. The same Law holds in respect to the Courts of Admiralty; whether Prize or not Prize, belongs to the Court of Admiralty; Jurisdiction of that Court decides upon the Subject; though they have given a wrong Decision, though the Facts did not warrant it, though the Judge has done it corruptly, yet it is a Sentence which the Common Law Courts must be bound by, wherever it comes in Litigation here; and I have known, in Point of Experience, in an Action of Trespass brought here for seizing a Ship, where it has been before a Court of Admiralty and received a Decision, that the Court of Common Law no longer entertains the Cause, for the Question of Prize or not Prize is peculiarly belonging to the Admiralty Jurisdiction, and you give Faith and Credit to that Jurisdiction. I might refer your Lordships too (but the Cases are innumerable upon the Subject) to that of *Burroughs* and *Jemmino*, in *Strange*, 233, which was upon a Bill of Exchange, where by a peculiar local Custom within *Leghorn*, it is competent to the Acceptor of a Bill, by a Judgment of the Court, to have his Acceptance annulled, if the Drawer becomes Bankrupt before the Bill be payable; there is no such Law in this Country; yet giving Credit to the Sentence of that Court, the Court of Chancery



here would not send it to a Trial at Law, but determined upon the Point, that the Sentence in that Court was decisive upon the Subject, it being a Matter within their Jurisdiction.

My Lords, In almost every Case where Judgments or Records of other Courts have been the Subject of Discussion, the Sentences of the Ecclesiastical Court have always been cited and argued from as conclusive upon the Subject of Dispute, and the Courts have uniformly adopted those Cases as Law; but the Attempt has ever been to distinguish Cases immediately before the Court from those determined by the Ecclesiastical Jurisdiction. Your Lordships will find much of that in the Case of *Philips* and *Bury*, in *Skinner*, 468.

My Lords, There was a very late Case determined in the Court of Common Pleas, and which is now got into Print, reported by Mr. Serjeant *Wilson*, which is *Biddulph* and *Ather*. It arose upon a Question of Claim by the Duke of *Norfolk* to all Wreck within the *Cape of Bramber*, in *Suffex*, which was proved by many Records; it was a Question whether those Records were admissible, or if admissible, were conclusive Evidence; the Counsel who argued in Favour of those Records and the Conclusion which was to arise from them, compared them to the Case of Ecclesiastical Sentences, and would gladly have brought those Records within that Rule; the Court in that Case acknowledged the Argument proper with respect to the Ecclesiastical Courts. The Court admitted that the Sentence of an Ecclesiastical Court, in a Matter whereof they have the sole Cognizance, is conclusive Evidence, and Parole Evidence shall never be received. My Lords, there is a Manuscript Note in Being of what the Judges particularly said, and I find it was cited, as One of the Instances where the Sentence was conclusive, by the learned Chief Justice who then presided in the Court: He says, if there is a Sentence in an Ecclesiastical Court declaring a Marriage; for Instance, if it could be proved by a Hundred Witnesses that the Parties were never within 500 Miles of each other, that Evidence is not to be received, but the Judgment of the Ecclesiastical Court is conclusive upon the Point. In many of the Cases I have cited to your Lordships the Question came directly before the Court, and received a solemn Discussion; in some the Doctrine has been recognized; in none, nor in any Case that I know of, has it ever been doubted. My Lords, though the Cases respect civil Suits, I trust that no real Ground of Distinction can be made between criminal and civil Proceedings; in civil Suits, Courts go as far as possible to relieve Claims founded in Equity and Justice; in criminal Cases, the Leaning is always to the Defendants; and therefore I should conceive such Evidence stronger in a criminal Prosecution in Favour of Innocence.

My Lords, I will take the Liberty, however, of reminding your Lordships of Two or Three Cases in Criminal Law, where the same Doctrine has been established, and the Acts of the Ecclesiastical Court deemed conclusive upon the Subject, until reversed by Appeal. My Lords, in the First Volume of Sir *John Strange's* Reports, 481, your Lordships will find a Case that happened at the *Old Bailey* in the 8th of *George* the First; it was an Indictment for forging a Will of a Personal Estate. On the Trial the Forgery was proved; but the Defendant producing a Probate, that was held to be conclusive Evidence in Support of the Will, and the Defendant was acquitted. This your Lordships see was a Prosecution for a very serious Offence indeed; a Prosecution for the Forgery of a Will: The Forgery is stated to have been actually proved at the Trial, but upon the Production of a Probate from the Ecclesiastical Court, whose Decisions are final and conclusive upon such Subjects, the Defendant was acquitted, and the Evidence of the Forgery rejected. It ought not to have been received, if that Circumstance of the Probate had been discovered sooner to the Court; but the Defendant, perhaps conceiving that there could be no Evidence to affect him with the Guilt of Forgery, with-held the Probate; whatever might be the Reason it is immaterial, he produced it in Time to save himself; for you must receive a Probate in the Ecclesiastical Court against the Testimony of Ten thousand Witnesses.

Your Lordships will find the same Doctrine in the same Book, 1st Sir *John Strange's* Reports, in the Case of *King* and *Roberts*, where that Defendant exhibited a Will in *Doctors Commons*, as Executor, and demanded Probate; after long Contest it was determined in Favour of the Plaintiff; and upon an Appeal to the Delegates this Sentence was confirmed; after the Sentence the Parties, who had brought it about, fell out amongst themselves, and discovered that the Will which had been proved was a Forgery; the Manner of giving Relief was to grant a Commission of Review, but the Person who had been disappointed and injured by this Forgery, also preferred a Bill of Indictment against the Persons concerned in the Act of Forgery. The Chief Justice refused to try the Cause whilst the Sentence was in Force, but insisted that it should stand off till the Sentence was laid out of the Case by the Decision of the Commissioners under that Commission of Review; my Lords, in this your Lordships find the Doctrine recognized in the strongest Manner.

The



The next Case, which came before the Court of King's Bench, is *The King and Gardell*; it was an Indictment prosecuted by Mr. *Crawford*, a Fellow Commoner of *Queen's College*, for Assault upon him. At the Trial of the Indictment the Defendant, who had acted by the Orders of the College, produced the Acts of the College by which Mr. *Crawford* was expelled. He came into the Garden of the College afterwards with an Intent to take Possession of his Rooms, and the Officer of the College took hold of him, and conducted him out of the Limits of the College; and this was the Assault in that Indictment, and which was in Point of Law an Assault; and unless the Defendant had a Defence, or an Excuse for his Acts, he must have been found guilty. The Act of Expulsion was given in Evidence; an Offer was made by Mr. *Crawford* to prove the Invalidity of those Acts, that by the Constitution of this College more Persons were necessary to concur in an Act of Expulsion than had been present at that Time, and other Objections were made to the Validity of those Acts. The learned Judge, before whom that Cause came to be tried, conceived himself concluded upon this Subject; that as the College had the sole Jurisdiction of the Cause, their Decision was conclusive upon him; and it did not signify upon what Grounds they had gone, for the Effect of their Judgment was an Excuse of the Defendant, and so long as it remained unimpeached, and unreversed in the proper Course, there could be no Doubt but it furnished Protection to the Defendant, or, to speak more properly, a Defence against this Indictment. This Doctrine not being satisfactory to the Gentleman, he brought the Business before the Court of King's Bench, and that Court were unanimously of Opinion, that the Court had done right at the Trial of the Cause to reject all Evidence upon the Ground of these Acts of Expulsion; that the Acts themselves, being within the Jurisdiction of the College, were sufficient for the Defendant to avail himself of; and that it was not competent to the Prosecutor of that Indictment to shew to the Court that these were not regularly or orderly done, or that they were invalid in any Respect whatsoever. My Lords, in that Case the General Doctrine was recognized; that in all Courts of competent Jurisdiction their Acts, however wrong they are, yet while they remain in Force, are conclusive upon every other Court; the Cases of Ecclesiastical Sentences, and many others, were then mentioned.

I might refer your Lordships Memory to the Cases in Exchequer Seizures, where Condemnations are given constantly without a Defence almost, and yet all other Courts are concluded by them. It has been thought so extremely hard a Doctrine, that Judges have wished for the Liberty of examining into the Fact, and to have the Matter fully discussed in the Courts; yet when the Matter came to be fully argued, the Result has ever been, that the Judgment has been found conclusive upon all other Courts whatever.

My Lords, Under these Authorities for a Succession of Ages, I confidently rest that your Lordships will, in the present Cause, conceive the Sentence of the Ecclesiastical Court now produced, in a Case clearly within their Jurisdiction, in a Case in which they have the sole Jurisdiction, to be conclusive; no Courts whatever have a direct Cognizance of Marriage but the Ecclesiastical Court. Suppose a Person without any Grounds whatever claims a Marriage, it may be highly injurious to the Lady; she has no Remedy but by resorting to an Ecclesiastical Court; because there is no other Court that can bring the Matter immediately and directly in Question: If a Woman separate from her lawful Husband, what Court is there to compel her to cohabit with him but the Censure of the Ecclesiastical Court? It is that *Forum*, which the Constitution of this Country has intrusted with the Decision of the Legality of Marriages.

As there are not to be found in Common Law, or Ecclesiastical Courts, any Decision contrary to those I have, with great Deference, already submitted to your Lordships Consideration, I trust your Lordships will give that Determination upon the Validity and Effect of this Sentence, which Courts of Law have ever done, when a Sentence of the same Kind has been a Matter of Discussion.

*Mr. Mansfield.*

My Lords,

I am also to trouble your Lordships in Support of that Sentence, which has been offered to you as conclusive upon the present Occasion. The Sentence having been read to your Lordships, you are now apprized of the Contents of it. The Proceedings in the Ecclesiastical Court, of which the noble Lady at the Bar hopes to avail herself, begin, as your Lordships have heard, by a Complaint on her Part, that Mr. *Hervey* did, before that Suit was commenced, improperly and without Ground lay Claim to her as his Wife; in other Words, in the Language used in that Court, that he did jactitate that the Lady was his Wife. The Suit being thus begun, the next Proceeding in it is in the common Way, where a Person



thus called upon means to insist upon a Marriage. The Defendant in the Suit admits that he did claim the Lady as his Wife, and contends that he had a Right to do so, because he was lawfully married to her. Such being his Allegation, her Ladyship's Answer to it is, that there is no Foundation for his Claim; that she is not, that she never was his Wife; and she states in the Allegations made by her, which your Lordships have heard, a great Variety of Particulars during a very long Period of her Life, in which in the most publick Manner, and upon the most important Occasions, she was universally reputed, received, and acted as a single Woman. After this Allegation of her's, the next Proceeding was to examine a great Variety of Witnesses, upon the Result of whose Testimony follows that which is the important Part of the Business, that is, the Sentence of the Ecclesiastical Judge; which Sentence pronounces in the same Way in this as in all other Suits, where Two Parties litigate a Marriage claimed on one Side, and denied on the other; that these Two Parties were free from any Matrimonial Contract. If that Sentence is to have the Force, which, as it is apprehended by those who sit on this Side of the Bar, by Law it must have, it will of course follow, that this Indictment must fall to the Ground; because the sole Foundation of the Criminal Charge is the supposed Marriage with Mr. *Hervey*, which this Sentence, if conclusive, must unanswerably prove never to have existed. It must, we submit to your Lordships, follow as a Consequence, that this is the proper Place and Point of Time to stop; it would be to no Purpose for your Lordships to sit here to hear a long Story, the Object of which, when the Sentence was conclusive, would only be to give Pain to one whose Sufferings no one would wish to encrease; and at last, after it had been heard, no possible good Effect could follow from it. As Evidence ought not to be heard, if this Sentence is conclusive, because it would be hearing that which could have no Intention, no Weight, no Consequence; so it would be nugatory to state it, and every Body would wish to decline the Hearing it for the Reasons to which I alluded; and I am persuaded, not only for the Sake of the noble Lady at the Bar, but for the Sake of preserving that which every one will always think of great Importance, that is, Uniformity in legal Decisions and Judicatures, that this Sentence must upon this Occasion, as I believe on every one has been in which any such Sentence has ever been produced in a Court, be deemed decisive and unanswerable.

My Lords, That it ought to be so upon this Occasion, I will first endeavour to shew to your Lordships by considering the Nature of that Act of Parliament upon which the present Prosecution is founded, and the State of the Law before that Act of Parliament was made.

My Lords, The Act of Parliament creates no new Offence; it punishes nothing but what was punishable before; a Second Marriage while a former existed: Taking a Second Husband or Wife while there was a former in being, was undoubtedly an Offence long before this Statute of King *James* the First; indeed as long as the Ecclesiastical Constitution of this Country has subsisted. This Act of Parliament makes no other Alteration in the Law, but as it subjects Persons committing this Offence to temporal Prosecution and Punishment; before this Act such an Offence could only be the Object of Ecclesiastical Censure and Punishment: But, my Lords, the Makers of this Statute never dreamt, that they were in any Respect altering the Ecclesiastical Constitution of this Kingdom; that they were in any Instance invading or breaking in upon the Rights of the Ecclesiastical Courts: No such Thing is to be found in the Statute, nothing is to be collected from that; indeed if you might collect from the Preamble to the Act of Parliament, it will appear to every one who reads it, that it was not in the Imagination of those who framed this Law, that a Second Marriage could be made the Object of Punishment, where there had been a Sentence, which prevented a supposed former Marriage being binding upon the Parties. When I say that, I allude to the Exceptions in the Act, which make no Part of your Lordships present Consideration. But besides that, the Preamble of the Act tells your Lordships what it was that the Makers of it had in View: The Preamble tells your Lordships, that divers evil disposed Persons being married, run out of one County into another, or into Places where they are not known, and there become to be married having another Husband or Wife living, to the great Displeasure of God and utter Undoing of divers honest Men's Children and others. Now it never was supposed by the Makers of this Act of Parliament, that the Persons described in the Preamble of it would go through the Form and Ceremony of a Trial and Litigation, and obtain a Decision in the Ecclesiastical Court, before such Second Marriage was to take Effect, which was to be the Object of this Law: But it is enough that in this Statute there is not any Thing that tends to diminish or break in upon the Dominion of the Ecclesiastical Court; but that the Statute left those Courts and the Law relating to them just in the same Situation as they were before. Now if this was an Offence before the Act, how was it punishable? What would have been the Operation of such a Sentence before this Law? Unquestionably a Person taking a Second Husband or

Wife,



Wife, the First being living, might have been made the Subject of Punishment in the Ecclesiastical Courts. Let me suppose a Prosecution commenced for that Purpose by the Second Husband or Wife, the First Husband or Wife being living: Those who stand near me, who are much better acquainted with the Proceedings of the Ecclesiastical Court than myself, will tell your Lordships, that so long as this Sentence remains, the Relation of Husband and Wife could not exist, which alone must be the Foundation of a Prosecution; for taking a Second Husband upon this Statute, the Act upon which the whole Proceeding is founded, having made no Alteration in the Case, the Law remains the same. It does not follow from thence, nor are your Lordships to suppose it, that such a Sentence as this would in the Ecclesiastical Court have made Adultery lawful, or have made a Marriage with a Second Husband or Wife a good one: Certainly not; but while the Sentence subsisted, it would have proved, that there was no First Marriage at any Time by any Parties interested. Such a Sentence as this may be undone; it is a fundamental Rule in all Matrimonial Causes in the Ecclesiastical Courts, that, in their Language, *Sententia contra Matrimonium non transibit in rem Judicatam*. The Issue or the Kindred of Persons intitled to Estates may have a Variety of Reasons for impeaching Marriages. As to the continuing in a Second Marriage, the continuing in Adultery, the repeating it is only an Increase and Aggravation of Sin where the First Marriage ought to have prevented it. At any Time there may be a Suit to restore and set up a First Marriage, which has been undone by a Sentence by Accident, by Mistake, by Collusion, or from any other Reason not satisfactory. If all the Evidence that could have been had respecting the Marriage, has not been laid before the Spiritual Judge, any Party who has any Interest may at any Time again apply to that Court, again institute a Suit, offer new Evidence, have that which has been already heard, heard again, that the Marriage, if it did really exist, may be established by a Sentence of that Court: This is I believe clear Law, and undoubted in that Judicature. If it is, then your Lordships are not to conclude, that by any Sanction which you give this Sentence, you either authorize Adultery, or give Effect to Second Marriages while First Marriages subsist; no, at any Time that First Marriage may be established notwithstanding a Sentence against it, when any Person shall think fit in a legal Way in such Judicatures to impeach that Sentence: But all that is contended for is, that while that Sentence remains, the Matter is concluded; the Marriage cannot be proved to exist; the Relation of Husband and Wife is destroyed.

My Lords, If this which I have now submitted to your Lordships be, as I apprehend it is, well founded in the known Practice and Law of these Courts, the Consequence I trust will be, that this Sentence must now have the Effect under a Prosecution upon the present Act of Parliament, as it would have had in a Prosecution in the Ecclesiastical Court for an Adultery, or a Crime against the First Marriage. In that Judicature, the only one which by the Laws of this Country has a regular Jurisdiction to enquire into Marriages, by a solemn Judgment these Two Parties are declared not to be married; that would have been an Answer to any Prosecution before the Statute. The Statute leaves the Power of the Ecclesiastical Courts exactly as it was before: Leaving it so, a Sentence pronounced by that Court in a Cause, in which it has clear Jurisdiction, must I apprehend be decisive. But, my Lords, it is undoubted. Various Cases, which I shall not trouble your Lordships with the Repetition of, have been mentioned, which prove that to no Purpose can this noble Lady at the Bar and Mr. *Hervey* be considered as Man and Wife, or proved to be Man and Wife while this Sentence subsists. No conjugal Duties can be exacted from one to the other: Was a Wife starving in the Streets, she could not in any Way oblige him to contribute to her Support. Whilst such a Sentence remains, the Woman cannot be a Wife for any beneficial Purpose resulting from Matrimony: And it will be, I believe, difficult to point out one for which she can be a Wife, unless it be for the single Purpose of subjecting her to be punished as a Felon for marrying a Second Husband. I can hardly believe that any human Creature can be found, who would wish that the noble Lady at your Bar should for this Purpose alone, and in this single Instance, be deemed a Wife when she can be in no other. But if there be any who wish it, I am satisfied your Lordships Wishes will go along with the Law as I understand it to be, if the Law be so: And that it will be very difficult to convince your Lordships, that she, who was not a Wife for any other Purpose, should be deemed a Wife in order to be subjected to criminal Punishment for an open, an avowed, and by her thought an honourable Marriage with a noble Duke.

My Lords, In every Instance in which an Issue in the Temporal Courts, in the Courts of Common Law, is joined upon Matrimony, where a Marriage is insisted upon on one Side and denied on the other; in every Instance of that Sort we know the Temporal Courts decide not; they send to the Spiritual Courts to have the Matter enquired into and decided



upon ; nothing is more clear than that Rule of Law. So it is in Cases of Dower ; where Dower is claimed by a Widow, where it is denied that she was ever lawfully married to her Husband, the Temporal Court says, it has no Power to enquire into the Matter, it must refer it to the Spiritual Court ; and the Decision of the Bishop is final upon the Point. It is not only in the Case of Marriage, but in other Cases, that the Decision of the Ecclesiastical Court is the only competent one, and is final and conclusive to all Purposes : So it is upon Questions of Legitimacy, where Bastardy is alledged and denied ; the Common Law Courts decide not the Point ; they send it to the Ecclesiastical Court : So it is with regard to the Probate of Wills ; and no Case can be stronger than that which was mentioned to your Lordships, where even upon a Criminal Accusation, a Charge of Forgery, an Accusation resembling the present, a Decision of the Ecclesiastical Court in Favour of a Will was held to be conclusive Evidence upon an Indictment for Forgery, and that no Proof could be received of the Fact of Forgery in Opposition to such a Sentence. It is not only so in these Instances of the Ecclesiastical Court, there are others with regard to Captures ; the Decisions of the Courts of Admiralty are in like Manner conclusive : So the Court of Exchequer upon Disputes concerning the Revenue : There are many other Instances which might be pointed out to your Lordships, in which after the Sentences of Courts having competent Jurisdiction all other Courts are shut out from Enquiry into the Matter, however it might appear that such Sentences are not founded in Truth. This Rule is so clear and so well known, that I will trouble your Lordships with no particular Cases or Instances in which any such Matter is determined ; but there are some that have been already mentioned to your Lordships, and one other which I shall add, to which I shall beg your Lordships Attention on account of another View, which it is necessary for him who would contend for the full Force of this Sentence, to see this Subject in.

My Lords, It may be said, something of that has been hinted already ; much we know has been talked out of Doors, not all I believe warranted by the Fact ; but of that now we are not to judge or enquire : But it may be said, in Answer to these Arguments giving the utmost Force to such Sentences, let them be final and conclusive as they may, yet if a Sentence can be shewn to be the Effect of Agreement and Collusion, that it shall not be final ; that it shall not have a binding Force. If those, who are to argue against the Effect of this Sentence in the Extent in which it is now endeavoured to be urged, should be at Liberty to say, that they would attempt to shew that this Sentence now in Question before your Lordships was the Effect of what is called in the Common-Law Courts, Covin or Collusion : If there was any Ground, as I do most firmly believe there is not, to impute this Sentence to any such Original ; yet before your Lordships I trust it will appear, that this is not the Place in which any such Collusion ought to be enquired into. Those Courts, which the Constitution has trusted with the Investigation and Decision of Matters relating to Marriage, are fully equal to the Decision of any such Collusion : They may undo their Sentences where they appear to be collusive : And it is not to be presumed that any collusive Sentences would be encouraged in those Courts. Indeed there is one strong and cogent Reason, why no such collusive Sentences are to be feared in those Courts ; because, as I before observed to your Lordships, a Sentence there, though conclusive while it stands, may at any Time be attacked or impeached by those who find an Interest in so doing : And if it may, then it would be idle for Persons to be collusively obtaining a Sentence, when any Relations that might be affected by Issue of a Second Marriage ; in short, any Person who has an Interest might overturn and destroy it. This at least is very obvious upon the Sentence that is now urged to your Lordships, and the Effect of it with regard to the present Prosecution ; that, if it was to stop the present Prosecution, the utmost Consequence that would follow from it would be this, that it could only prevent such Prosecutions having Effect in Cases in which in Truth the Parties, who had to do in the Cause in the Ecclesiastical Court, and who obtained the Sentence, were so circumstanced, that it would not be the Interest of any human Creature to endeavour to undo their Work : And that it is not one of that Sort of Marriages, such a Second Marriage, as it was the Object of this Temporal Law, the Statute of *James* the First, to make the Subject of Punishment. It was made on account of Temporal Mischiefs happening, as recited in the Preamble ; although it is mentioned and truly mentioned in that Statute, that such Second Marriages are to the Dishonour of God, and are undoubtedly high Offences against Religion, and the holy Ceremony of Marriage ; yet if that had been the only Evil that had been apprehended or found from such Second Marriages, it is not to be believed, but that the Legislature of this Country would have left such Marriages to have been considered, enquired into, and punished in those Courts, in which all other Offences against Religion are very properly only cognizable and punishable.

It



It was the Temporal Mischief that produced that Law; and your Lordships may easily judge, what Apprehensions of any Temporal Mischief would arise from such Weight being given to this Sentence, as is contended for from Prosecutions being stopped by such Sentences; when it is clear that Sentence cannot do Mischief to any human Creature, who does not chuse to sit down and acquiesce under it; for the remotest Issue at the greatest Distance, that can be hurt, may commence a Suit in the Spiritual Court, and may therefore get rid of this Sentence. Give it therefore its utmost Force, let it weigh as much as is desired in the Scale in favour of this Lady, it would only go to prevent a Prosecution, where the Marriage undone was of such a Sort, that no human Creature would have an Interest to support it. This, I observe to your Lordships, supposing that it may be urged against this Sentence, that it will be attempted to be proved to be produced by Agreement and Collusion.

My Lords, There are Cases, one of which has been already mentioned to your Lordships, that in Terms prove that That Collusion is not the Subject of Temporal Enquiry, that it ought to be confined to the Spiritual Courts. There are other Cases, which seem to me in Effect to prove the same Thing.

The Case of *Kenn* has already been mentioned to your Lordships: In that Case it was an Attempt by the Issue of that Marriage, where there had been a Divorce between the Parents of that Issue, to establish the Marriage. In the Divorce the Sentence had proceeded upon the Parties not having been of marriageable Age, that is, the Man of Fourteen, the Woman of Twelve; that they had never cohabited together, or consented to the Marriage after they had attained to marriageable Years, to the Years of Consent as they are called. But who is it attempts to undo that Marriage?—the Child who was born of those Parents, cohabiting together long after they had attained the Age of Consent; and yet that Issue was not heard: No, the Sentence was held to be conclusive; a Sentence proceeding clearly upon a Ground which must be false; stating that the Parties were not of the Age of Consent; stating that they had never consented after they had attained that Age; when it was an undoubted Fact, indeed the Existence of that Issue, which litigated it, proved that they must have consented to the Marriage after the Age of Consent.

The next Case that I would suggest to your Lordships is one that has not been mentioned, but which appears to me to be extremely strong to the present Purpose. It is the Case of *Morris and Webber*, in *Moore's Reports*, 225. The Case, in short, was this: Two Persons, one of the Name of *Berry* and the other of *Wilmot Gifford*, had been married; they had been married some Years; they had no Offspring; a Suit was commenced in the Spiritual Court for a Divorce; a Sentence was pronounced, which in the Words of the Book are *propter vitium perpetuum et impotentiam Generationis* in the Husband. The Sentence having so proceeded, not long afterwards both these Parties married again, and each by the Second Marriage had several Children: Some Years afterwards a Cause arose, in which it became a Question, Whether the Issue by the Second Marriage of the Husband thus divorced could be legitimate? It was contended, that those subsequent Children by that Husband had proved, and irrefragably proved, that the Foundation of the Divorce was false; that there could not be that *vitium perpetuum* which was made the Ground of the Divorce. The Common-Law Court, before whom this Question came, clearly held, that That was necessarily proved by the subsequent Children which that Husband had had; but still clear as it was, that this Sentence was founded in an apparent Falshood, yet it must stand: It is the Sentence of that Court to which the Constitution of the Country has entrusted the Decision of such Matters; it is not for our Courts to enquire into it; we should usurp a Jurisdiction which does not belong to us; and upon that Ground it was determined, that till that Sentence of Divorce was undone in the Ecclesiastical Court, it must be binding and conclusive, and the Issue of the Second Marriage must be deemed legitimate.

My Lords, No Cases can well be imagined stronger than these to shew, that even Sentences founded in Agreement, founded on what may be called Collusion of the Parties, are yet binding, till they are rescinded in that Court, to which alone the Law of *England* has intrusted and confined the Consideration of such Matters.

Another Case, which has already been mentioned to your Lordships, is the Case of *Hatfield and Hatfield*, which seems to me also to decide this Point, and to decide in Terms. The Case has been already fully stated to your Lordships; I need therefore only point out One or Two Particulars of it: There was a Dispute between the Heir of one *Hatfield* and a Woman, who claimed to be the Widow of the Father of that Heir; he insisted upon it, that she was not the Wife of *Hatfield* his Father, because she had been married to one *Porter*; the Marriage with *Porter* was proved; *Porter*, who was a Party to the Suit in the



Court of Equity, admitted it upon his Oath: A Release was obtained by the Heir from that *Porter*: In order to get rid of this Release, and though the Fact of Marriage was proved in the clearest Terms, the Woman commenced a Suit for Jactitation of Marriage against *Porter* in the Spiritual Court; a Sentence upon his not appearing was pronounced in that Court against him, and that was held in the House of Lords to be conclusive. Those who went before your Lordships, then sitting in Judicature, said, this was a Sentence by a Court which had the alone Jurisdiction of the Matter, and while it stood—it must decide. The Books that take Notice of this Case expressly say, that the Sentence was considered—indeed after the Case stated to your Lordships it could not but be so considered,—as collusive, I think is one of the Words to be found in the Books; and yet though appearing to be a feigned and collusive Sentence, the Answer was, that Collusion is to be judged of alone in the Court where the original Matter arises, which has alone Jurisdiction upon the Subject; no other Court can consider it.

My Lords, I am aware that it may be said in Answer to this Case, that this was in a Court of Equity, which had no Jurisdiction to enquire into Questions concerning Marriage in the Ecclesiastical Court. My Lords, that is no Answer; for wherever a Sentence founded in Agreement between Parties is used to the Prejudice of a Third Person, in whatever Court it is, unless the Subject be of such a Nature that it is exclusively confined to the particular Court in which it arises, wherever such a Sentence is attempted to be used against a Third Person, that Third Person may avail himself of the Collusion upon which it is founded: For how is it, that in all common Cases, where Questions arise about collusive Sentences, that the Party against whom they are used gets rid of them? In order to do that no Proceeding is requisite in the Court in which the Sentence is: No; the Person against whom it is urged says, however that Sentence may be between you Two who are Parties to it, however it may bind you, it is founded in Agreement between you Two, and it is nothing to me; as against me it is void. Thus in the common Case of Executors, a Creditor has a Right to be paid out of the Effects left by a dead Person, who is Debtor: The Executor intending to cheat the Creditor by an Agreement with another Person, who is no real Creditor, prevails upon him to commence a Suit, and suffers Judgment to pass at the Instance of such a Friend; by which he is made the original Creditor, and the Executor, as Representative, Debtor to the Person so suing by Agreement. The real Creditor cannot pursue any Steps to undo the Judgment: No; he says, by Way of Answer, that Judgment is void against me; you Two Persons agreeing and colluding together shall not turn the Forms of Law to my Prejudice: And as this may be done in one Case, why not in every other, where a Judgment or a Sentence founded upon Collusion is used against a Third Person, who has no Way to answer it but by saying at once, it is void against me, however it may stand good between you?

This, my Lords, is the Way in which all Judgments by Collusion or by Covin in my Knowledge are answered and got rid of. But in the Case of *Hatfield* and *Hatfield*, which I last alluded to, it is answered, that the Court of Equity, and the House of Lords judging as a Court of Equity, had no Authority to enquire at all into a Matter depending in the Ecclesiastical Court relating to Marriage, because that Court hath an exclusive Jurisdiction upon the Subject; and yet in that Case and in this there could be no Reason, I submit to your Lordships, why, if an Agreement of the Parties could be a Ground for impeaching a Judgment, it might not be as well done in that Judicature as in this?

My Lords, When I am speaking of any Arguments that one may suppose to be urged from an Attempt to prove Collusion, there are Differences between any such Judgments as are got rid of by a Third Person, because prejudicial to him, and founded upon an Agreement between Two Parties to a Suit with which he has nothing to do: Is that the present Case? No Third Person, that has an Interest, attempts now to set aside this Judgment: The Object here is to annul the Judgment as between the Parties to that Suit. In all the Cases that can be referred to, where Questions arise upon Judgments passing by Agreement, intended to be levelled against a Third Person; in all such Cases, as between the Parties, the Judgment stands good. The Object of those, who in such Respects impeach the Judgment, is merely to prevent its having Effect against those who are Strangers to it: But here this Judgment, this Sentence, must, as between the Parties, be totally undone and annihilated, or else it decides the Question; because unless it is undone, if it stands good between those Two Parties till properly impeached in the Ecclesiastical Court, why then they are not Husband and Wife: And this Consideration materially distinguishes such a Judgment, so impeached as the present is, from the common Case in which Judgments are to be affected, not so as to be avoided between the Parties, between whom they stand good



good, but as being laid aside more properly than being avoided, so as not to be turned to the Prejudice of a Third Person, who is not a Party to them.

My Lords, Another Distinction which I have before suggested to your Lordships, which I remind your Lordships of, as upon the present Head of the Arguments I am suggesting to your Lordships, there is this Difference between all the Cases that can be brought before your Lordships upon the Head of Collusion or Agreement; in all those Cases, in such as I have alluded to, and a hundred others might be put which fall within the same Rule as a Judgment set on foot by an Executor to defraud an honest Creditor: In such Cases the Parties have no Way themselves to commence a Suit to set aside this Judgment; their Mode of doing it is, when the Judgment is used against them, answering, Whatever the Judgment may be as between you Two, as to me it is void: But there is no regular Process of Law, no Suit to be commenced, by which any such Judgment can be set aside by a Third Person: There is no Suit. If it could be done at all, it must be done in a Manner which furnishes Argument in Support of the present Sentence, because it could only be done by an Application to that Court in which such a Judgment is given; another Court may say, where it is attempted to be used, that if it be proved to be founded in Agreement by those who are Parties to it, it shall not be turned against a Third Person; but no other Court but that in which the Judgment is given can set it aside and annul it.

My Lords, These Distinctions clearly appear, as I submit to your Lordships, in such Cases where such Judgments are attempted to be got rid of by Third Persons as detrimental to their Interests: But I believe I can produce to your Lordships a Legislative Instance, that a collusive Judgment in the Spiritual Court cannot be set aside after once given; that it is final and conclusive. I have already mentioned it to your Lordships as one of those Points arising in Courts of Justice, upon which all Consideration is confined to the Ecclesiastical Courts: None is more important than a Question concerning Bastardy or Legitimacy. The Way, your Lordships know, in which that Question is sent to be tried by the Ecclesiastical Court, is this: In Actions of various Sorts, where a Person claims a Title by Descent, the Legitimacy of his Birth becomes material; if the Party against whom he claims says that he is a Bastard, and upon that an Issue is joined, the Common Law Courts in which the Question arises send the Matter to the Ecclesiastical Court to be enquired of and decided. In Answer to a Writ for that Purpose going from the Common Law Court the Ecclesiastical Judge makes a Certificate, and he certifies that the Party is a Bastard, or is Legitimate: That Certificate is conclusive; it is not only conclusive between the Parties to the Suit, it is conclusive to all the World; it never can be touched or moved again; that Certificate once received, that Record in the Common Law Courts is final for ever.

My Lords, To prevent the Mischiefs that might arise from such Transactions happening by Agreement, and a false Certificate obtained by Collusion, depriving Persons of their legal Rights, various Forms are now requisite by an Act of Parliament, which I will state to your Lordships, that originally were not so. Various Proclamations are necessary in the Court of Chancery, and likewise in the Court of Common Law, in which such Question arises, in order to give universal Notice to all Persons who may by Possibility be interested, that such a Question is to be sent to the Ecclesiastical Court: But before that Act of Parliament no such Proclamations were necessary. The Act of Parliament will shew your Lordships what then was the Effect of a collusive Sentence in the Spiritual Court upon the Subject of Bastardy; and the Sentence of that Court was conclusive, and could not be touched by any Temporal Judicature.

My Lords, The Act of Parliament was made in the 9th of King *Henry* the VIth, Chapter the 11th: The Title of the Act is, "Proclamations before a Writ be awarded to a Bishop to certify Bastardy."

My Lords, The *Preamble* of the Act before it comes to the enacting Part is very long. I need not read the Whole of it to your Lordships: It is in Substance this: "That several Persons, who are named as petitioning in the Law, who claim, some as Sisters, and others as claiming under Sisters, to be Heirs of *Edmond* Earl of *Kent*, were apprehensive of the Effect of a collusive Certificate that would be obtained by *Eleanor* the Wife of *James* Lord *Audley*, who pretended herself to be the Daughter of that *Edmond* Earl of *Kent*; and the Meaning of the Act was to prevent the Effect of such a collusive Certificate, which was apprehended would be obtained by this *Eleanor* Wife of *James* Lord *Audley*; and stating that there was no Foundation for any such Pretence. That she was not the Daughter of the said *Edmond*, the Act goes on to say; nevertheless the said *Eleanor*, the Wife of *James*, upon great Subtilty, Process imagined, privy Labour, and other Means and coloured Ways, to the Intent that she ought to be certified *Mulier* by some Ordinary, in case that Bastardy



should be alledged in her Person, hath brought, as it is said, in Examination before certain Judges in the Spiritual Court, knowing nothing of these Contrivances, certain suborned Proofs and Persons of her Assent and Covin, deposing for her, that she was begotten within Marriage had and solemnized between the said *Edmund* and *Constance*, late Wife of *Thomas Lord Despensers*; so that it is very likely that the same Ordinary would certify the said *Eleanor* the Wife of *James Mulier*; which Certificate so had and made ought, by the Law of *England*, to disinherit the said Dukes, Duke of *York*, Earl of *Salisbury*, Earl of *Westmoreland*, *John* Earl of *Typtoff*, *Alice*, *Joyce*, and *Henry*, and their Issue for ever, of the whole Inheritance aforesaid." Thus your Lordships see it is stated that such a Certificate, so obtained by the most flagrant Covin and Collusion, which is stated here in this Preamble of the Act, is said to have such Effect, that it ought by the Law of *England* to disinherit the Heirs and their Issue for ever, though a Certificate most palpably obtained upon the grossest Fraud and Collusion. Then it goes on to *provide*, "Whereupon the Premises tenderly considered and to eschew such subtle Disinheritings, as well in the said Case as in other Cases like in Time to come, by the Advice and Assent of the Lords, and at the Request of the said Commons, it is ordained, 'That if *Eleanor* the Wife of *James* be certified *Mulier*, that no Manner of Certificate shall in anywise put to prejudice, bind, endamage, or conclude any Person, but him or his Heirs that was a Party to the Plea.' Thus it provides a Remedy in that particular Case: Then it goes on to *enact*, that in future all Proceedings of this Sort shall be attended with different Proclamations that are ordered by that Act, that it may in future be known when such Certificate will be applied for to the Spiritual Courts, and that all Parties interested may have Notice to make their Objections. Now, my Lords, what will be said of the Effect, the Weight, the Authority of Ecclesiastical Sentences in this Part of the Law after the Act of Parliament? Does it not appear by this Law, that the Certificate, in other Words the Decision, of the Ecclesiastical Court in a Case of Bastardy, even though founded upon Collusion, was decisive, when once it was formally received from the Ecclesiastical Judge? And if it was so, will it be at all a Stretch of the Authority of that Judicature now to say, that a Sentence in a Cause of Marriage, which is as peculiarly to be confined to their Jurisdiction, ought to have the same Force? And if it is not to have the same Force, will it not be breaking in upon or evading that Jurisdiction, in a Way which your Lordships Predecessors have never done, if you should now suffer this Sentence in another Place to be impeached and overturned?

My Lords, Your Lordships will remark, that in those Cases which your Lordships have been referred to, there is one, the Case of Forgery, which is the Case of *Farr*, that is more exactly like the present, and where a Decision of the Spiritual Court upon a Will is held to be decisive against the clearest Proof of Forgery. But with respect to the other Cases, your Lordships will observe, that they are all Civil Cases: And if this Difference and Respect is to be paid to Sentences by the Ecclesiastical Judicature in Civil Causes, I am sure I need not observe to your Lordships that in Criminal Causes, where the noble Lady at your Lordships Bar is to be entitled to every Indulgence, to every Favour, these Decisions do from that Consideration acquire double Force.

My Lords, It may be said, what did this Act of Parliament of *James* the First mean? that when there had been such a Sentence as this, though those who were Parties to it knew that they were in Truth Man and Wife, that after such a Sentence either of the Parties, so knowing that they were Man and Wife, should be at Liberty to marry again without incurring the Penalties of this Statute? In Answer to that it may be replied, that whilst this Sentence stands, if there be any Weight in the Arguments urged in Support of it, it is not to be presumed that it was so, or could be so, known to the Parties; because that was to impeach the Sentence. But another Answer occurs from the Act itself; for the Act did not mean in all Cases to punish a Second Marriage, where the former Husband and Wife were found to be living; because there is an Exception in the Act, an Exception which permits, I mean so as not to make it punishable, permits a Marriage with a Second Husband or Wife, even though the former be living, and be known to be living. Let but the Sea be placed between the Husband and Wife for Seven Years, though they know each other to be living, the Law takes not Place; they are not the Subjects of Punishment: That I take to be extremely clear. The Circumstance of Knowledge does not necessarily import, that a Person marrying a Second Husband or Wife must be subject to the Penalties of this Law on account of that Knowledge of the First Husband or Wife being living. As to the Immorality of the Case, as to the Effect against Religion, against the eternal sacred Obligation of Marriage, it remains exactly the same, whether the Husband is on this Side the Channel or the other. But the Law has said in that Case, though the Ceremony of Marriage would be thus offended against, though the Obligation would be so far violated, that a Husband



or Wife, knowing that the other Husband or Wife were living, should take a Second; yet that Knowledge is not sufficient within the Act in that Instance to subject the Party to Punishment. It is not therefore in every Case that the taking a Second Husband or Wife, even with Knowledge that there is a former subsisting, will subject a Party to Punishment; that the Act says. It is not a Part of the present Question before your Lordships. To suppose that after this Sentence the noble Lady at your Bar could be so well acquainted with the Ecclesiastical Law, as to know that this Sentence would not be binding; that is too absurd to suppose. If a Sentence in the Ecclesiastical Court is to have that Weight, which it has had from the earliest Times; if the same Rule is to take Place in Criminal Courts of Judicature, and in Favour of the Criminal, which has been again and again established in Civil Causes; then this Sentence is conclusive. There will be an End of the present Prosecution. And your Lordships will not forget what I did before take the Liberty to suggest to your Lordships, that giving the utmost Sanction to this Sentence, you never bastardize Issue, you never disturb Families, you never deprive Individuals of their Right; because every human Creature, who is at all interested to dispute a Sentence against a Marriage, who wishes to set up or support it, may at any Time apply to the Ecclesiastical Court, and there have the Marriage set up again and established. No Cause therefore can ever pass, in which a Marriage will remain undone by such a Sentence, except where there is no human Creature who thinks it worth their while to endeavour to support it. And this Temporal Law may surely very well go unenforced while a Sentence stands, and on account of that Sentence, which with the utmost Weight and Credit given to it can produce no Temporal Mischief. If it be wrong, if the Parties to it in procuring it did wrong, it may at any Time be undone in the Ecclesiastical Court; and as to the Offence against the Right of Marriage, against the religious Constitution of the Kingdom, that Court may at any Time effectually punish those who have been guilty of any such Offence, who have improperly married a Second Husband or Wife, who have improperly attempted to get rid of a Marriage that was legally established.

And therefore upon the Whole I submit to your Lordships, that upon the Authorities of Law there is no Ground to impeach or attack this Sentence; that it is final, it is conclusive, of course no other Evidence ought to be received impeaching this Marriage; that the Indictment therefore must fall; and that as no Evidence can be received, it would be idle, impertinent, and of no Use to state it.

*Doct<sup>r</sup> Calvert.*

My Lords,

It is my Duty likewise to trespass a little upon your Lordships Patience on the same Side with the Gentlemen who have gone before me, though this Question has been by them considered in the widest Extent of View that I believe it is capable of.

My Lords, The Motion now made by the Noble Lady at your Lordships Bar is this, that having that Species of Evidence which she apprehends is conclusive in her Favour, and precludes the Prosecutor from going into any Evidence on his Part, it may be received by your Lordships as the only Matter proper to take into Consideration.

My Lords, That Evidence which her Grace offers, is a Sentence in the Ecclesiastical Court, pronounced in a due Suit thereupon, in a direct Line of Marriage; the Purport of which was, that there was no Marriage subsisting between the Honourable Mr. *Augustus Hervey* and the Noble Lady at the Bar, as the Indictment lays there was, at the Time she married the late Duke of *Kingston*, that Marriage being the sole Foundation of this Accusation; for if that fails, the Marriage with the Duke of *Kingston* was perfectly innocent. If this is a Proof, such a one as your Lordships by Law ought to abide by, that there was no such Marriage subsisting between them, to go into Evidence of any Sort must be totally nugatory.

My Lords, It is well known, that by the Constitution of this Kingdom there are different Courts appointed for the Litigation of different Questions; these Courts are, as the Constitution supposes, well adapted to the Purposes, and exercise that Jurisdiction which can take up the Point originally, and determine it directly; and it is contended, that while that Determination subsists, it ought to have its Effect in all other Places, and in all other Courts where there shall be Occasion to make Use of it.

My Lords, This is not asserted only of one Species of Courts, I mean the Ecclesiastical Courts, but it applies, I apprehend, to Sentences of all others whatever, that when a

Judgment



Judgment has been given by any Court having original and direct Jurisdiction, though that may incidentally come before another Court, yet they don't go into that Question which has by a competent Judicature been before determined.

My Lords, It is true, it is impossible for any Courts to continue to exercise their Jurisdiction for any considerable Time without many Questions incidentally arising, which are not really and originally within their Jurisdiction, many of Ecclesiastical Cognizance; and for the Purpose of determining that Cause, if the incidental Point has not already had a Decision in an Ecclesiastical Court, they must be gone into; because if they were not, there would be no End of the Interruption of Justice. Many Questions arise in the Ecclesiastical Courts, which are originally of Common Law Jurisdiction, yet the Ecclesiastical Court must go so far into that Consideration, as to see whether the Pretence be true: For the Purpose only of determining the Cause then before that Court, they could not have originally determined this Question. Suppose, for Instance, a Legatee claiming a Legacy in an Ecclesiastical Court, the Executor may plead a Release; now the Validity or Invalidity of that Release is originally cognizable by the Common Law Courts and no other, yet the Ecclesiastical Judge must so far take that Plea into Consideration, as to see whether there is *prima Facie* a Release or no: But it was pleaded in Reply, that there had been a Question upon that Release at Common Law, that it had been there put in Issue, and that there was a Verdict against that Release. I apprehend, that no Ecclesiastical Judge then would think himself at Liberty to enter into the Question, whether it was a good Release or no; but the Verdict must be taken as true, because the Court, though incidentally it was obliged to take Notice of it, has not a Jurisdiction to determine the original Question.

My Lords, This may be applied to the Question that is now before your Lordships: Marriage Causes are peculiarly by the Constitution given to the Ecclesiastical Courts, they alone can determine an original and direct Question of Marriage as between the Parties; and if Determinations of Courts, having original and direct Jurisdiction, are to receive Weight, and meet with Credit from all other, then the Determinations of Ecclesiastical Courts upon Marriage ought, wherever they come in Question in any other Court, likewise to be received as conclusive. The obvious Reason of this strikes me to be, because though every Court can determine in some Measure a Question merely as applied to what is then before them, yet they cannot determine it generally, they cannot determine the very Question as applicable to other Purposes. As for Instance, suppose any temporal Right under a Marriage is to be considered in a Common Law Court, and it may be necessary for that Purpose to enquire whether there be such a Marriage; the general Question, whether such Persons are to all Intents and Purposes Man and Wife, whether they are bound by the Obligations of Duty arising from that State, is certainly not to be determined but in a Court of Ecclesiastical Jurisdiction; and when that Court has been in Possession of the original and general Question, and has determined it, for the Common Law Court to enter into it, might be in Effect to alter and undo a Judgment, as far as the Consideration then is before the Court, which certainly that Court has no Jurisdiction to do. That this is to be received as a general Position, I apprehend, is supportable upon this Ground; upon the great Incongruity of Sentences, which otherwise must arise. Now suppose there be a Sentence in a Court that has the original Jurisdiction to determine Marriages between Man and Wife; to determine upon the State of those Persons, whether they are in Fact in that Relationship; all Determinations upon that Question in any other Court may be directly contradictory to that Sentence, which still must remain; for the Parties will and must remain Man and Wife, or the contrary not Man and Wife, according as the Sentence was, if that Question has been directly determined in an Ecclesiastical Court; and any Determination that would be given by another Court, may be contrary to that Obligation and that Connection which the Court, having a Power, has determined was between them. On these Considerations therefore, I apprehend, it is, that whenever a Question of Matrimony has arisen in any Common Law Court, if there has been no Determination in the Ecclesiastical Court, the Question may be open; but if that Question has ever come directly in point before the Court, having direct Jurisdiction to determine it, I apprehend to this Time there always has been such Credit given to the Sentence, that it is taken to be conclusive and be determined between the Parties.

My Lords, This Distinction was made, I conceive, upon the best Grounds, so long ago as that Case alluded to by the learned Gentlemen who have gone before me, I mean *Kenn's Case*, reported by Sir *Edward Coke*; that was in the Reign of King *James I.* In that Case there is cited the Case of *Corbett*, which was as early as *Edward IV.* Taking the Doctrine laid down upon these Two Cases together, the Position there established, and I trust adhered



adhered to ever since, is this, that when there has been a Question of Marriage litigated by the Parties themselves in a proper Court, and the Question has been determined upon the Marriage, the Sentence will always hold good, till it is reversed by that Court. So much was determined in the Case of *Kenn*: In the Case of *Corbett* it was determined, that where One of the Parties is dead, and no such Sentence was had between the Parties while living, a Person cannot commence Proceedings in the Ecclesiastical Court relative to that Marriage: The Reason is, that then the Object of such a Suit must be temporal Considerations only, it must be to bastardize Issue, or it must be for some Purposes which the Ecclesiastical Court has not original Jurisdiction of; but the mere Question of Marriage, of Connection between Man and Wife, can never come into Question, nor ought it to be litigated after the Death of the Parties: Therefore, the Ecclesiastical Court, after the Death of the Parties, does not entertain that Suit, nor can it be legally commenced.

My Lords, There are a Variety of Cases which have been determined that have been quoted already to your Lordships, and which I should be very sorry to take up your Time in repeating; but it seems to me on those Authorities to have been established, that as often as these Sentences have been pleaded they have been allowed, whether they were Sentences in Causes of Nullity, of Marriage, or in Jactitation of Marriage.

My Lords, If Danger is to be apprehended from too much Credit being given to such Sentences, lest for improper Purposes they might be unduly obtained, there seems to be less Danger in Questions that arise upon Marriage than in any other; for this Reason; that there can be no Determination against a Marriage but what is open to future Litigation. We all know, that in a Question of Marriage any Person that has an Interest may intervene before Sentence given; and any Person having an Interest, though they have neglected to intervene in that Cause, might appeal within the proper Time: Nay, I will go so far to say, that if any Person having an Interest should have so far neglected it as to omit availing himself of an Intervention or Appeal, yet he might still come before the Court, shew his Interest, and be heard. A Marriage Cause goes farther still; for I believe in most other Cases a Determination would be for ever binding, at least to the Parties; but in these Questions, I conceive it is not; for if there was to be a Question between a Husband and Wife in a Cause of Jactitation, and, as in this Cause, it was determined that there was no Marriage, yet the Party against whom that Sentence was obtained, I apprehend, might appear afterwards, he might produce any new Proof that he did not know of at that Time, or even if he had not produced what Proof he had, he might be heard upon it: The Reason of that Indulgence I take to be this: By the Canon Law a Marriage was held to be indissoluble, and for that Reason a Sentence against it never could be final: *Sententia contra Matrimonium nunquam transit in rem Judicatam*. The Canon Law, it is well known, has been received in this Country with respect to Marriage, particularly as to that Position of its being indissoluble. In most other Questions, as of Property, a Person might be bound by Time, bound by not making so good a Case as he should have done; but as a Person cannot release himself from the Obligations of Marriage by any Lapse of Time, or any Neglect in stating his Case, the Question is ever open; therefore these Cases are certainly the least dangerous, because if any Body appears, who apprehends himself injured in this Matter, and has an Interest, to shew that this Judgment was not duly obtained, he may be heard; but while such a Sentence remains unimpeached, I apprehend it is conclusive. The Sentence now before your Lordships is a Sentence in a Cause of Jactitation; it has been supposed upon the Authorities, many of which have been cited to your Lordships To-day, that when a Sentence determining upon this Point has been offered in any Court coming in incidentally, it has been constantly received: But, my Lords, it has been received with this Restriction, as it is laid down expressly in *Blackham's Case*, which has been already quoted, it must be where the Marriage has been directly in Issue; for if it be an incidental Point only, it would not then be satisfactory: In *Blackham's Case*, where the Question arose upon the Grant of an Administration, it was argued, that the Ecclesiastical Court having determined upon that Administration, they had virtually determined the Marriage, and therefore it was binding upon all Parties; but it was said, No, the Question must be originally and directly upon the Marriage, or it shall not have Effect; and the Distinction seems to be exceedingly good.

My Lords, In order to bring the present Case therefore within this Principle, it is necessary to shew, that the Sentence now under your Lordships Consideration is a direct Determination upon a Marriage; because if it be not, it would be liable to the Objection which I have now stated.



My Lords, The Proceeding is that of a Cause of Jactitation, which is begun by a Man or Woman: In this Cause it was the Woman calling upon the Person, who claims to be the Husband, for having boasted and asserted that Lady to be his Wife, to abstain from such Assertions for the future.

My Lords, Here the Question originally seems to be, whether the Person called upon had ever really claimed the Lady. In that Stage of the Cause, if the Claim had not gone as far as a Justification, some of the Books assimilate this Proceeding to a Cause of Defamation, supposing it to be a Case of Words only; and when upon a Marriage being pleaded to justify the Claim, the Question turns upon that Marriage, it may perhaps be argued, that it is not a direct Case of Marriage, but an incidental one only: It may not therefore be improper to consider it in this Case, lest such an Observation should be made. I take it, that when in a Cause of Jactitation the Defendant gives in a Plea stating a Marriage, and that Marriage is contradicted by the Plaintiff, though it is intended indeed as a Defence to the Accusation for which he is called upon to answer, that of having claimed the Lady, yet the Question then alters its Nature; the Plea is not only intended to intitle the Defendant to his Admission, but the Court is then in Possession of the Question, whether there was a Marriage between the Parties, and the Determination is direct upon a Marriage: If the Marriage be proved, there is the same Sentence passed as in a Matrimonial Cause; there is a Sentence directly pronouncing there was a Marriage, the Parties are pronounced to be Man and Wife, and they might be admonished to restore to each other conjugal Rites: If, on the contrary, the Defendant should fail in Proof, the Determination is this, that the Party has failed in his justificatory Matter, and the Sentence in this Case goes, that the Judge has found that he has failed in the Proof of the Marriage alledged to have been had between them, he is declared to be free from all Matrimonial Contracts, and enjoined not to boast in future; it would be therefore a Fallacy to argue, that this is not a direct Determination of the Question of Marriage: It is indeed ingrafted upon the original Cause of Jactitation, but that is agreeable and consonant to Practice in other Instances.

My Lords, It is not a monstrous Thing to assert, that a Cause may change its Nature from its original Institution.

[*At a Motion of One of the Peers Part of the Sentence read.*]

*Doctor Calvert.* Unacquainted as I am with the Proceedings of this high and august Court, which I never had the Honor to appear in before, I conceive it is my Duty to take immediate Notice of those Words which have been read, as I suppose they were called for, because I ought to confine my Observations to them before I go any farther. The Lady, who is the Object of that Enquiry, is pronounced to be a Spinster, as far as yet appears.

My Lords, These Words are inserted in this Sentence, and I apprehend are in every Sentence of this Nature; the Purport of which, I trust, means this, that the Case is open to future Disquisition upon the Principles that have been already stated; that though the Judge determines upon the Evidence that is then before him, yet the Parties, having an Interest to bring that Question on again, may be heard. As far as yet appears to us, says the Judge, the Lady is free from all Matrimonial Contracts; and as long as that Sentence remains, I mean to argue that it is a conclusive Sentence: I don't mean that the Court is precluded from another Enquiry; I have stated, that no Parties are precluded from another Enquiry; and I conceive the Meaning of those Words are to express, that according to the Light which then appears to the Court, the Court pronounces the Sentence; but a Sentence of that Sort is not from thence to be argued to be nugatory, and that the Court determines nothing; the Court determines upon what it has heard; and as long as that Sentence remains, that is the Way in which I meant to put it, it is decisive and conclusive.

My Lords, I have said, that though the Cause began originally upon the one Party calling on the other to justify his Claim as Husband in a Cause of Jactitation, it is nothing monstrous to suppose it has so far changed its Nature as to become a Marriage Cause; and I will mention other Cases in which the Ecclesiastical Courts, as is well known to the Practitioners in those Courts, adopt and admit of a similar Practice. Suppose, for Instance, a Man was to bring a Suit against his Wife for the Restitution of Conjugal Rites; in Bar of that Restitution the Woman may plead Adultery or Cruelty in the Husband, which is certainly a Reason against admonishing her to return home to her Husband; but, my Lords, this is not all that the Court would do in such a Case, for she having pleaded Adultery, that Plea becomes in Fact a Libel in the Cause, and it will become a Cause of Adultery; and I have known within my Memory, and since my Attendance at the Bar, Instances of that Sort. In a Case of *Mathews* and *Mathews*, determined in 1770 in the Consistory of London, the

Wife



Wife pleaded Adultery in Bar to Restitution; the Cause went on in that Suit, and there was a Sentence of Divorce: Would any Body contend, that it was not as direct a Sentence of Divorce, as if it had been so originally instituted? And in case either of those Parties had married again during that Divorce, and an Indictment had been preferred for Polygamy, can it be contended that this Sentence of Divorce would not be a Defence under the Proviso in the Body of the Act?

My Lords, Another Instance: Suppose a Man brings a Suit for Separation by reason of Adultery against his Wife, the Wife may recriminate, and may give in an Allegation pleading Adultery in the Husband; the Prayer indeed on each Side would be for a Separation; but there is a very considerable Difference between a Sentence for Separation formed upon a Crime being in the Man or in the Woman, whether it is at the Suit of one or the other; but if the Party that is Defendant in the original Suit should go on and prove that Adultery, and the Plaintiff should not, the Defendant would be intitled not only to a Dismission from the Suit the Plaintiff originally brought, but to a Separation upon Account of the Adultery pleaded by the Defendant.

I mention these Cases to shew, that it is not enormous to suppose, that though the original Question might begin in a Cause of Jactitation, yet the Marriage being pleaded, the Sentence either one Way or the other is and must be as determinate as if the Question had originally been upon Marriage. There is a Case that was litigated in the Ecclesiastical Court not long ago, and which at the Time was much talked of, and is well known; I mean the Case of Mr. *Thomas Hervey*, who brought a Suit of Jactitation of Marriage in the Consistory Court of *London* against Mrs. *Hervey*. In that Court a Marriage was pleaded, the Sentence was against that Marriage; the same was affirmed in the Court of Arches; but when it was appealed to the Court of Delegates, they reversed this Judgment, and pronounced for the Marriage; pronounced not only that Mrs. *Hervey* was justified in her Jactitation, but pronounced expressly and directly for the Marriage; and I believe nobody will Doubt, but that Marriage was as conclusively determined between them as if it had been originally a Marriage Cause, or a Suit of Nullity of Marriage. That these Sentences have been held to be conclusive in the Courts of Common Law where they have been offered, those many Instances that have been mentioned seem to me to put it out of all Doubt.

It will not be improper to consider what Effect a Sentence of this Sort would have in the Ecclesiastical Court; and I shall contend, that while a Sentence of this Sort is existing, a Wife could not be heard to have any Claim upon her Husband; she could not claim the Restitution of Conjugal Rites; there is no Light in which she would be understood to be the Wife until the Marriage be again brought into Question. There is a Case in Print that seems to me to go exactly to the Point I am now contending for; it is in the Case of *Clews* and *Bathurst*, which has been mentioned already to your Lordships, as reported in *Strange* 961; but, my Lords, that Case is reported likewise in another Book, a Book lately published, which I am told is good Authority, and the Cases well and correctly taken; it is called, Cases in the Time of Lord *Hardwicke*, and it is to be found in Page 11. There the Case is stated a little more at large; and a Case is said to be quoted by Dr. *Lee*, of *Mellisent* and *Mellisent* in the Year 1718; in that Case a Woman had claimed to be the Wife of a Mr. *Mellisent*, *Mellisent* libelled her in the Ecclesiastical Court in a Jactitation of Marriage; she pleaded a Marriage, but failed in the Proof, and there was a Sentence, I apprehend, of the same Sort as in this Cause: After the Death of her Husband the Woman would have made out her Right to the Administration, and for that Purpose she pleaded her Marriage; that must have originally began in the inferior Court, and from the Nature of the Suit, I suppose, came from the Prerogative; but however, the Determination I am alluding to was in the Court of Delegates; it was determined, as there remained in Force a Sentence which was a Bar to her, she could not be heard to make out her Case as a Widow to the Deceased. Your Lordships very well know, that though the Prerogative is an Ecclesiastical Court, yet the Jurisdiction of that Court is confined merely to Probates and Administrations, and it does not entertain Causes of Marriage. Mrs. *Mellisent* there claiming as the Widow of the Deceased in that Court where the Sentence of the Marriage could not be set aside, it was held, there being a Sentence in a Cause of Jactitation, in which the Marriage was pronounced against, she could not claim as Widow. In that Case the Prerogative Court held the same, as we are contending your Lordships will upon this Occasion.

There was another Case in the Prerogative Court in the Year 1771, *Lady Mayo* against *Brown*. The Question arose upon an Administration to *Gertrude Brown*, who died intestate. Administration had been granted to *Stephen Brown* as her Husband, he having married her in the Year 1720. Afterwards that Administration was called in by *Lady Mayo*, a

Daughter



Daughter by a former Husband; and she contended that *Brown* had no Right to that Admittance, inasmuch as at the Time he married *Gertrude* he was already the Husband of one *Eleanor Cutts*. In Answer to that it was pleaded, that there had been a Suit of Jactitation of Marriage brought by *Brown* against *Cutts*, in which the Marriage was pronounced against, and he was pronounced to be free from all Matrimonial Contracts with *Eleanor*. In Answer to that another Plea was given, stating that it was a collusive Suit, that they could shew Fraud and Collusion: The Admission of this Allegation came on to be debated before the Judge of the Prerogative; and thus far the Judge said, there being a Sentence now in another Court (this was in the Prerogative that had not Jurisdiction of Marriage, there being a Consistory of *London*) by which it is pronounced that this Person was free from Matrimonial Contract, this Court cannot admit this Allegation; and all Proceedings in that Court were stopped, that is, that Allegation was not admitted, till the Party, if she thought proper, might go to the proper Court to reverse it. Nothing has been done in that Cause since; and I conceive, in all Probability, never will: I apprehend therefore that this Sentence, which is now under your Lordships Consideration, must, as long as it remains in Force, be held to be conclusive; for this Reason, because though it can be enquired into, yet it is not now even in a Way of Litigation, nothing has been done to repeal it, nor are there any Steps towards it, but it remains in its full Force.

My Lords, The learned Gentlemen who have gone before me have thought proper, in order to obviate any Objections that may arise, to consider what would be the Case, supposing it should be urged by the Counsel on the other Side, that the Prosecutor would undertake to shew, that this was a fraudulent Sentence and obtained by Collusion. My Lords, the Reason of our mentioning that is, not on Supposition or Belief that there would come out any such Practices in the present Cause, but that, taking it up as we do as a previous Question, it is our Duty to consider it even in the most disadvantageous View, and to maintain, that in no Case which they can suppose ought Evidence to be received against the Sentence; and upon that Head I apprehend that every Argument, which can be adduced to shew that the Consideration of Truth or the Want of Truth in such a Sentence ought not to be gone into by this Court, may with equal Propriety be applied against going into the Question of Collusion, because that Court which gave the Sentence is open to that Enquiry, and, I apprehend, alone proper and competent to the Purpose. How vague and unsatisfactory must be the Enquiry of different Courts proceeding upon different Matter, different Principles, even the Terms made Use of quite different! Should they enquire into the Question, whether the Proceedings were fair or not, it may be productive of Error. Suppose it should be shewn in some Particular that there was Evidence supplied, how would it appear the Judgment did depend upon that Ground? Their entering into the Proof of Collusion would be as strongly exceptionable as their enquiring into the Right or Propriety of the Sentence, whether it was duly and rightfully pronounced by the Judge, which is an Exercise of Jurisdiction which no independent Court has over the Sentences or Judgments of another. Your Lordships are well acquainted, that there is no appellate Jurisdiction in a Criminal Court over an Ecclesiastical Court; the Question can only be, whether that Sentence shall be received as final and conclusive: But the Method in which it was obtained, whether it was rightly and duly pronounced, are very good Questions for a Court of Appeal, which can reverse that Sentence; but an Enquiry into the Method of obtaining it is improper, as long as the Sentence remains. If then a Sentence of this Sort will be held to be conclusive and satisfactory in all Civil Questions, and I conceive the Authorities which have been quoted will be sufficient to establish that Principle, surely it will much more strongly apply to all criminal Cases; because your Lordships will see it to be the strangest Proposition to maintain, that when a Man or Woman are not to be considered as Husband and Wife to any Civil Purpose, yet they shall be so only for the Purpose of Punishment; this surely would be the greatest Absurdity: Yet supposing the Sentence not repealed, which imports the Man and Woman are not Husband and Wife, and suppose that be the general Sentence that ought to apply to them in every Situation whatever, though the Criminal Jurisdiction should go on to pass Censure upon the Person accused (for that is all the Criminal Jurisdiction can do) that will not destroy the Sentence in the Ecclesiastical Court, and they will remain not Husband and Wife, though the Criminal Court should punish One of them for what is supposed a Second Marriage.

My Lords, I suppose it will not be contended that a Determination before a Criminal Jurisdiction ought to have the Effect of a Determination directly upon the Marriage: I apprehend, that in Point of Law it cannot be supposed it should be so argued. Your Lordships will see, the Injustice of such a Proceeding then would be prodigious, because then a Criminal



Jurisdiction must determine upon the Rights of many Persons who have not a Possibility of being heard. Keep their Question in the Civil Court, adhere to the Determination of that Court that has an original Jurisdiction; there all Parties might have been heard, and they may in future, if they can set up any Interest; but a Determination in a Criminal Court, that might apply in the most remote Degree to determine Civil Causes, would be the most manifest Injustice, because no Persons could be heard for their Interest.

The Question for your Lordships Determination, if it should be ever gone into, will be upon the Marriage said to be had with Mr. *Hervey*; any Determination here that may affect that Right, may affect not only the Persons that were immediately the Parties to that Suit; but your Lordships see many Connections arise upon Marriage, many Relationships and new Claims that may be precluded by such a Sentence as this. Suppose the Duke of *Kingston* had had Children by his Marriage, it would be as much their Interest to establish this Sentence, as it would be of Interest of any other to impeach it; and that such Rights as these should be determined in a Criminal Jurisdiction where the Parties cannot be heard, I apprehend, is a Position that never was yet maintained.

Upon these Principles I hope your Lordships will be of Opinion, that the Rule ought to be applied as well to Questions that can arise in Criminal Jurisdictions as in Civil ones. That Criminal Courts have determined upon these Principles, there are Cases which have been alluded to, and which are, I apprehend, extremely pertinent: One is the Case of the King against *Vincent*, *Strange* 481, mentioned to be an Indictment for Forgery in having forged a Will: The Reporter says, Forgery was proved, but the Defendant produced a Probate under the Seal of the Ordinary; and it was held, that That was satisfactory Proof of the Validity of the Will. That is a very a strong Case; but that there is no Right to determine upon Civil Matters in such a Way as this, or even to prejudice Civil Matters, is very clear in that Report.

My Lords, There is another Case reported by the same Author Sir *John Strange* 703, the King against *Rhodes*, that came before the King's Bench, when Sir *Robert Raymond* was the Chief Justice. That was upon an Indictment likewise upon a Forgery for having forged a Will, that Will had been proved in the Ecclesiastical Courts. My Lords, it appears by this Report, that it was not only a Probate in the common Form, it was when there had been a long Litigation in the Ecclesiastical Courts, and when by a Decree of the Court of Delegates the Will was pronounced for; upon Application to the King's Bench for a *Habeas Corpus ad testificandum*, the Court there decreed not to issue the Writ for this Reason, because it appeared that there was then existing a direct Sentence for the Will; and that Sentence, if it had been pleaded in Bar to going into the Question of Forgery, I apprehend, would have been allowed to be conclusive Evidence; for the Court said, it was not fitting to determine the Property on an Indictment: It likewise appeared, that though there had been a Sentence of the Court of the Delegates pronouncing for the Will, that yet there had been an Application for a Commission of Review, so that it was within the Knowledge of the Court that the Cause was in a Means of having a Revision; but it was understood that the Sentence still remained perfectly in Force, for your Lordships know perfectly well the Difference between an Appeal and an Application for a Commission of Review: In Case of an Appeal, the Sentence is suspended, but not so on an Application for a Commission of Review. By the Statute of *Henry VIII.* it is provided, that the Sentence of the Delegates shall be final, and no Appeal shall be had from them; but it is now indisputable Law that the King may by his Royal Prerogative, upon a personal Application, and a special Case laid, direct a Commission for reviewing the Sentence; but there is no Appeal, the Sentence remains the same, unless the Reviewers in their Judgment shall think proper to reverse it. In this Case it appears, that there was then existing a full and direct Sentence upon the Validity of that Will. It was understood then that this Right had been pleaded by the Defendant, and the Chief Justice stopped the Proceeding, and did not even grant that Motion which was then sent. These Two Cases, I am told, have been recognized again in that Court in a very late Case of a Man who was executed for a Forgery, one *Perry*; and I am told the Judge at that Trial offered to the Prisoner to put off his Trial, if he had a Mind to make use of that Plea; but I am told, it was not accepted by the Prisoner, and the Trial went on: But this I am sure, no Use can be made of that Case to shew, that the former Determinations were at all impeached by it, because at least, if the Probate was not insisted on by the Defendant, consequently not over-ruled by the Court, these Cases then remain in their full Force; and I will ask in what Manner they may be said not to be applicable to the Principle we are contending for, that in a Criminal Court Cases of this Sort ought not to be gone into? Will it be said



that this being a Prosecution under a special Act of Parliament, the Crime consists in having married Two Persons, that the Marriage must necessarily come under the Consideration of that Court which is to determine? And they cannot by the Act of Parliament itself acquire an original Jurisdiction to enquire into the Right of Marriage. Does not it apply exactly as strong to the Case I have now alluded to of forging a Will? for it is by express Act of Parliament made a Felony of Death to forge a Will; and it may as well be argued, from hence, that every Criminal Court has by that Act acquired an original Jurisdiction as to Wills. It cannot be argued a Moment, that a Criminal Court has original Jurisdiction of Marriage. I do not say, when it has not been determined before, but that the Court must necessarily enquire into the Fact; but that it cannot originally entertain such a Question. Now there cannot be a Case stated wherein a Question was between the Parties upon the Validity of their Marriage and upon their State of Man and Wife, to shew that it can be determined by a Criminal Court: If it cannot, I conceive clearly, it cannot be said to have original Jurisdiction upon the Point the Fraud and Collusion; which, for the Reason that has been given, it was thought proper to mention, lest it should be made Use of upon the other Side. It will be said perhaps, that there are many Instances where Parties trying to avail themselves of a Judgment, or the Sentence of another Court, of the adverse Parties being allowed to shew that those Sentences were obtained collusively: This Distinction I conceive has been made. If any Court ever is permitted to enquire into the Question, it must be a Court having concurrent Jurisdiction; and then your Lordships will see the Question upon every different Grounds, because a Court having concurrent Jurisdiction has also the Opportunities, all the Methods of enquiring into the original Question: They being competent to determine the original Point, it makes no considerable Difference whether it comes before them at first, or whether it has before been determined by another Court. It will not be contended, I conceive, that a Criminal Court has any concurrent Jurisdiction with the Ecclesiastical Court; it clearly cannot be so; it can never entertain the abstract Question between Parties, whether they are Man and Wife or no; the only Way it can be taken up is incidentally; and if the Authorities are good to shew, that where an incidental Question arises, if it has been determined by a Court having original Jurisdiction, it ought to be conclusive; that will apply to the Case now before the Court. For these Reasons, and for those that have been more weightily argued by the Gentlemen who have gone before me, I hope your Lordships will not think proper to recede from the established and legal Principles, or make a Precedent on this Occasion; but if whatever has been, was upon the Strength of former Determinations, and if there is good Ground in Law to say that this Sentence ought to be conclusive to the Point to which it is now offered, I trust your Lordships will be of Opinion that the Prosecution ought not to be permitted to go into any Evidence.

*Doctor Wynne.*

Notwithstanding there has been so much and so ably said upon this Question, I hope that the Duty I owe to the noble Person at your Lordships Bar, will plead my Excuse for offering a few Words upon the same Side, in Support of the Sentence of the Ecclesiastical Court, of the Effect with a View to which it is now produced before your Lordships.

My Lords, The Duchess of *Kingston* is now upon her Trial, upon an Indictment found against her grounded on Statute 1 *Ja.* cap. 11, for that being the Wife of *Augustus John Hervey*, she married the Duke of *Kingston*, the said *Augustus John Hervey* her former Husband being then alive. The Foundation of this whole Proceeding therefore is a Marriage alledged in the Indictment to have been had between the Duchess of *Kingston*, at that Time Mrs. *Elizabeth Chudleigh*, and Mr. *Augustus Hervey*.

That Marriage, my Lords, is the only Fact that can make any Criminality in the present Case; and if it shall appear to your Lordships a Fact, which has been already enquired into and decided upon; that it has been put in Issue in that Court which alone could properly take Cognizance of it; that That Court has pronounced its Sentence against the Marriage then put in Issue, or any Matrimonial Contract between Mr. *Hervey* and Mrs. *Chudleigh*, who were the Parties to that Suit, and that this Sentence still remains in Force, it is submitted to your Lordships to be impossible that those who are prosecuting this Indictment against her Grace can be allowed to go into an Examination of Witnesses upon that Marriage; it being a Fact now decided by the legal Sentence of a proper Court, and consequently not the Subject of that Kind of Evidence which the Prosecutors are, we presume, endeavouring to offer to your Lordships upon it, as if it had been a Question upon which no Sentence had ever been given.

My



My Lords, The Sentence, upon which we rely, was passed in the Month of *February* 1769, and it recites all the Proceedings had in that Cause prior to the Sentence, and which are sufficient, as we apprehend, to found that Effect which we contend it ought to have before your Lordships. The Sentence recites, that a Suit had been brought by the Duchess of *Kingston* against Mr. *Hervey* for boasting that he was her Husband: That Mr. *Hervey* appeared in that Cause; that he admitted and justified the Jactitation; and alledged, that he was well warranted in making such Jactitation, for that he was actually married to the Lady: By that Means they were at Issue upon the Fact. The Sentence goes on to say, that he had entirely failed in the Proof of the Marriage, which he had pleaded and propounded; in consequence of which the Court pronounces Mrs. *Chudleigh* to be entirely free from all Matrimonial Contract, and particularly with the said Mr. *Hervey*, *so far as to us as yet appears*; and upon that goes on to admonish him to cease from farther jactitating in that Behalf. The Question now for your Lordships Consideration therefore is, what is the Effect of that Sentence? and I contend, that in the Way in which this Cause was proceeded in, it is as decisive, as absolute a Sentence against the Marriage, as the Ecclesiastical Court has Power to give.

If the Party who is accused in such a Suit does not justify the Jactitation by pleading a Marriage, it is otherwise; for in that Case, whether the Fact of Jactitation is admitted or denied, the Sentence is only upon the Jactitation, not upon the Marriage: If the Jactitation is admitted, and is not justified, the Party is admonished to do so no more; if the Jactitation is denied, the only Question before the Court is, did the Party jactitate or not? and if the Jactitation is proved, the Sentence is the same, *viz.* a Monition to cease from doing so for the future. But if the Party cited confesses the Jactitation, and justifies it by pleading that he or she was and is actually and lawfully married to the other Party who has brought the Suit, it is no longer a Cause of Jactitation, it is as much and as directly a Marriage Cause as a Cause of Nullity of Marriage, or a Cause for Restitution of Conjugal Rights. It is as absolute and decisive Proof of this, in my humble Apprehension, that if the Party cited in a Cause of Jactitation pleads and proves a Marriage, the Court does not in that Case dismiss, and say, the Party it is true jactitated, and had a Ground for jactitating, therefore we dismiss: No, the Court pronounces for the Marriage. And I take it to be most clear, that such a Sentence having been pronounced in any Ecclesiastical Court, if the Party cited should immediately pray Restitution of Conjugal Rights, the Court will grant its Monition grounded upon that Sentence, that the Parties who were proved to have been lawfully married, should cohabit and perform the Duties of their Marriage. It will not I presume be contended that any Court can deal so very unequal a Measure of Justice between Parties, as to say, if a Marriage is proved we will pronounce for it: And yet in a Cause of exactly the same Nature, if a Party pleads a Marriage, and fails in the Proof of it, we will not pronounce against it. The Supposition is absurd and shocking to common Sense; and it is impossible that such a Cause as a Cause of Jactitation could ever have been in Use, if the Party who brought it might lose his Cause, and be engaged in a Marriage he was desirous to avoid, but could never obtain any Sentence against the Party jactitating, that would have any legal Effect. It is impossible, with great Deference to your Lordships, that such Doctrine should ever have obtained; but the Truth is directly the Reverse, and in all Courts where these Sentences against a Marriage in a Cause of Jactitation have been produced, they have been allowed to be as decisive as any Sentence in an Ecclesiastical Court in a Marriage Cause could be. In the Case of *Jones* and *Bow*, reported in *Cartbew*, it is expressly said, that it was a Cause of Jactitation. In the Case of *Clewes* and *Bathurst*, which has been mentioned to your Lordships, it was a Cause of Jactitation; and I rather rely upon that Case, because it appears by the Report of it in the Book intitled *Cases in Lord Hardwick's Time*, P. 11. *Hil. 7 Geo. II.* that it was attended by as able a Civilian as any of his Time, Doctor *Lee*, afterwards Dean of the Arches: He argued in that Cause, that a Sentence against a Marriage in a Cause of Jactitation is an absolute and decisive Sentence. And it appears from the Report, that he quoted another Case, which was that of *Millisent* and *Millisent*; in which it had been so held in the Court of Delegates, which your Lordships know is a Court of Appeal in Ecclesiastical Causes, in which there are both Judges of the Common Law and Civilians. The Case which was last alluded to, and which was in the Prerogative Court, your Lordships will allow me to state a little more fully, because it will shew the Opinion of the great judge who now presides in that Court. It was upon the Right of Administration to one Mrs. *Gertrude Brown*: The Question was between *Stephen Brown*, who alledged himself to be the Husband, and the Lady Viscountess *Mayo*, the Daughter of the Deceased by a former Husband: The Marriage between *Brown* and Mrs. *Aylemore*, which was the Deceased's former Name, was



not denied; but Lady *Mayo* insisted, that at the Time of the Marriage with Mrs. *Aylemore*, Mr. *Brown* had another Wife at that Time living, whose Name was *Eleanor Cutts*. Mr. *Brown* to that replied, that he had brought a Cause of Jactitation in the Consistory Court of *London* against Mrs. *Eleanor Cutts*, and that Sentence had been pronounced exactly as in the present Case, and that he was free of all Matrimonial Contracts with said *Elizabeth Cutts*. Lady *Mayo* then offered an Allegation, in which she pleaded, that the Sentence in such Cause of Jactitation had been obtained by Collusion, and annexed to that Allegation she exhibited many Letters between *Stephen Brown* and *Elizabeth Cutts*, by which it appeared, that after the Date of the Sentence they had corresponded together; that he had acknowledged himself to be her Husband in several of these Letters, but told her it would be exceedingly inconvenient to his Affairs, and entirely destroy his Claim to the Administration of Mrs. *Aylemore*, which was of some considerable Value to him, if his Marriage with Mrs. *Cutts* was known, and therefore desired her to be silent, and not give him any further Trouble; that was the Effect of Lady *Mayo's* Allegation. The Moment that Allegation was brought into Court, the Proctor for *Brown* desired that the Proctor for Lady *Mayo* might be asked, whether he confessed or denied the Subscription of the Officer who authenticated the Copy of the Sentence given in the Cause of Jactitation? which being confessed, and the Sentence by that Means regularly proved, the Judge said he could go no farther; he could not enquire upon what Grounds that Sentence was given, but would give a Time to the Party, if she thought it for her Interest to apply to the Consistory Court of *London*, and see whether that Sentence could be reversed; but it was held, that so long as it remained in Force, it was decisive upon the Question of the Marriage, and absolutely binding upon the Judge of the Prerogative Court.

This being the Case then, the Question for your Lordships Consideration now is, what Effect the Sentence given in the Consistory Court of *London* in 1769, in the Cause of Jactitation of Marriage brought by the Dukes of *Kingston*, then Mrs. *Elizabeth Chudleigh*, against Mr. *Hervey*, should have in the present Cause before your Lordships? My Lords, it would be a very unpardonable Waste of your Lordships Time, at this Hour of the Day, for me to take up a Moment of it in arguing, that Marriage is by the Law and Constitution of this Country of Ecclesiastical Cognizance: There cannot be a Doubt, that if there be any Impediment to the Marriage of Two People living together as Man and Wife, that if One of the Parties denies either the Fact or Validity of the Marriage, that if One of the Parties refuses to perform the Duties of it by Cohabitation, that if One of the Parties treats the other with intolerable Severity, that if a Person boasts of a Marriage which he cannot justify, or if some Kind of Contract or Solemnity passed between Parties which may occasion a Doubt whether it amounts to a lawful Marriage or not; in every one of these Cases the Ecclesiastical Court has Cognizance to decide upon the Questions that arise, and it is a Denial of Justice to refuse it; and would be a just Ground of Appeal to a Superior Court.

It is true, that in some Cases where a Marriage is brought not directly, but collaterally and consequentially in Question, as where it is a Question of Legitimacy in order to make a Title to an Inheritance, it may originally commence in the Temporal Courts, and sometimes is finally determined there, as in the Case of what is by Common Law called Special Bastardy, that is, where there is no Doubt about the Marriage, but about the Priority or Posteriority of the Birth of the Party, who is claiming the Inheritance to that Marriage; there, it being a mere Matter of Fact, whether the Person was born before Marriage or after, it is proper for the Jury to determine; and there is no need of the Interposition of the Ecclesiastical Court at all. So in other Cases, where the Matter begins as a Question upon an Inheritance: A Person makes a Claim to an Inheritance as being the lawful Son of *A.* and *B.* if the Parties to the Marriage or One of them be dead, the Application must be made originally in this Case to the Temporal Courts, and they will proceed in it, and will either determine it finally, or direct a Case to the Ordinary to certify upon the Marriage, according as they find it necessary to do; and according as any Question arises upon the Legality of the Marriage or not: But even in this Case, which is merely a Question upon a Right to an Inheritance, and not between Parties to a Marriage, but between Parties claiming under a Marriage, if One of them produces a Sentence formerly given upon the Marriage by the Ecclesiastical Court in the Life-time of the Parties to such Marriage, the Moment that Sentence is produced, the Court of Common Law is stopped; and notwithstanding the original Parties to that Sentence are dead, the Parties to the Suit upon the Inheritance must still have recourse to the Ecclesiastical Court to repeal the Sentence formerly given upon the Marriage before the Temporal Court can proceed a Step further: And if this Sentence of the Ecclesiastical Court is not set aside, the Judgment of the Tem-



poral Court must be agreeable to that Sentence. The Cases of *Bunting* and *Leppingwell*, and *Kenn's* Case, reported by Lord *Coke*, are decisive upon this Point: And it would, I should conceive, in framing your Opinion upon the Credit due to the Doctrine laid down in these Cases, be worth One Moment's Consideration at what Time the latest of them was determined: *Kenn's* Case was in the Fifth of King *James* the First. Your Lordships know extremely well, that was a Time when the different Jurisdictions of the Temporal and Ecclesiastical Courts were not so completely settled, or at least that Settlement was not so completely acquiesced in on the Part of the Ecclesiastical Courts then, as it has been since: They did frequently desire to arrogate to themselves more Jurisdiction than the Temporal Courts were willing to allow; and the Consequence of that was, they were very frequently withstood: This produced a Complaint to the Privy Council in the 3d of King *James* I. when Archbishop *Bancroft*, in the Name of the whole Clergy, exhibited a Set of Articles against the Judges of the Realm (as Lord *Coke* expresses it, 2d Inst. 601.) intitled, "Certain Articles of Abuses which are desired to be reformed in granting Prohibitions:" These Articles were delivered to the Judges, who in the 4th of King *James* made their Reply to them, in which they justified the Proceedings objected to by the Archbishop in every Particular, and that not without some considerable Degree of Warmth and Resentment. Now, with great Deference to your Lordships, I should conceive, that a Resolution solemnly and unanimously made by the Two Chief Justices and Five other Judges of the Common Law in the very next Year after such a Dispute as this had been carried on between the Two Jurisdictions, cannot well be suspected of Partiality to the Ecclesiastical Court: And Lord Chief Justice *Coke*, who was One of the Court, was not a Judge that would at any Time have stood up for their Encroachments; and therefore there is not the least Room to apprehend, that there was any undue or improper Degree of Authority attributed by that Resolution of the Judges to Sentences of the Ecclesiastical Courts.

My Lords, This Case of *Kenn*, which is reported 7 *Coke*, 43, has been already opened to your Lordships; but it being in my Apprehension extremely material in this Cause, containing the whole Learning that is to be met with in the Book upon the Subject, and going the whole Length, as I humbly submit to your Lordships it does, that it is our Business to contend for in Behalf of the noble Person at the Bar, your Lordships will not perhaps think it mispent Time in me to state it more particularly. It was a Case in the Court of Wards, in which *Thomas Robertson* and *Elizabeth* his Wife were Plaintiffs, and *Florence* Lady *Stallenge* Defendant: The Case was, that *Christopher Kenn de facto* took to Wife *Elizabeth Stowell*, and had Issue by her *Martha*; soon after this there appears to have been a Suit brought in the Court of Audience, in which the Judgment given was in these Words: *Præsumsum contractum et Matrimonium inter Chr. Kenn et Eliz. Stowel in minore ætate eorundem aut eorum alterius habitum fuisse: Eisdemque Chr. et Eliz. tam Tempore solemnizationis dicti Matrimonii quam etiam continuo postea, eidem Matrimonio dissensisse, ac eo prætextu hujusmodi Matrimonium irritum et invalidum fuisse: Necnon antedictos Chr. Kenn et Eliz. Stowel ab dicto Matrimonio separandos et divorciandos fore pronunciamus, eosque separamus et divorciamus, iisdemque Chr. et Eliz. Libertatem ad alia vota convolandi concedimus per hanc Sententiam nostram definitivam.*

My Lords, After this *Kenn* married another Wife, *Elizabeth Beckwith*; and after this it appears that *Elizabeth Beckwith* brought a Suit before the Commissioners Ecclesiastical to enquire again into the Validity of the Marriage between *Christopher Kenn* and *Elizabeth Stowell*: There that Marriage was again pronounced against, and the Marriage of *Christopher Kenn* with *Elizabeth Beckwith* was affirmed; then *Elizabeth Beckwith* died, and *Christopher Kenn* married *Florence*, by whom he had Issue *Elizabeth*, and then died: At last the Question came on between the Issue of *Christopher Kenn* by *Florence*, and *Martha* the Issue of said *Christopher Kenn* by his First Wife *Elizabeth Stowell*, who desired she might be permitted to aver against the Sentence formerly given against the Marriage between *Christopher Kenn* and *Elizabeth Stowell*, declaring that she could prove, that the Whole was founded on an absolute Falshood; and that those Parties, who are declared by the Sentence of the Ecclesiastical Court to have been married in their Minority, and to have dissented to the Marriage in the Moment it was solemnized, and ever after, had cohabited as Husband and Wife for Ten Years, and had Issue *Martha*, the Party before the Court: This the said Party averred, and undertook to prove in the Court of Wards, in order to avoid the Effect of the Sentence of the Ecclesiastical Court against the Marriage between her Father and Mother. But it was resolved by all the Justices and Barons, that the said Sentence should conclude as long as it remained in Force: And in Answer to the Averment that the Sentence was founded upon false Facts, they said, that though the Ecclesiastical Judge sheweth the Cause of his Sentence, yet forasmuch as he is Judge of the original Matter, the Loyalty of Matrimony, we shall



never examine the Cause, whether it were true or not; for of Things, the Cognizance whereof belongeth to the Ecclesiastical Court, we must give Credit to their Sentences, as they give to the Judgments in our Courts. In that same Case it was, that Lord *Coke* quoted the Case of *Corbett*, and There there had been no Sentence in the Ecclesiastical Court; that originally began upon the Question of a Right to an Inheritance; and the Party who claimed the Inheritance was advised to bring a Suit in the Ecclesiastical Court then against a Woman who jactitated, as he said, of an undue Marriage with his elder Brother: The Party against whom this Suit was brought in the Ecclesiastical Court applied for a Prohibition, and the Temporal Court granted it; for they said, there is no Sentence of the Ecclesiastical Court in this Case for you to reverse, no Sentence has been given; therefore we will enquire, as far as we see we can do without interfering in Matters of mere Ecclesiastical Cognizance, respecting the Loyalty of the Marriage; and we may direct the Ordinary to certify hereafter, if there is a Necessity for it; but there is no Need to apply to the Ecclesiastical Court in the present State of the Case.

In exact Conformity to this Principle it was resolved by the Judges of the Common Law in the Case of *Bunting and Leppingwell*, 4th *Coke*, 29, forasmuch as the Cognizance of the Right of Marriage doth belong to the Ecclesiastical Court, and the same Court hath given Sentence in this Case, the Judges of our Law ought (although it be against the Reason of our Law) to give Faith and Credit to their Proceedings and Sentences, and so always have the Judges of our Law done: And so it was resolved, that the Plaintiff was Legitimate and no Bastard.

This is the Light in which the Sentences of the Ecclesiastical Courts, given in Matters properly within their Cognizance, were considered in the Courts of Common Law at the Time when the Cases I have just referred to were determined; and there is such a Train of Cases exactly conformable to them down to very modern Times, which have been already quoted, and therefore I will not trouble your Lordships with repeating them, that I cannot help thinking it must be looked upon as a Point absolutely settled and at rest.

But, my Lords, not to rest the Matter merely upon Authority, however strong, if your Lordships consider the Grounds upon which these Determinations were made, I apprehend they will be founded, not only in Justice, but in absolute Necessity; and that the Confusion would have been so infinitely great, if, admitting different Courts to take Cognizance of different Matters, their Sentences should not be allowed to take Effect when they were given, but the Matter might be examined over again, and a different Sentence given in another Court, the former Sentence remaining unrepealed, that there would be no Possibility of enduring such a Practice. Consider for a Moment what Effect it would have: Suppose a Man to have brought a Suit for Jactitation of Marriage against a Woman in the proper Ecclesiastical Court; that she should plead her Marriage by way of justification, and obtain a Sentence for it; the Man dies intestate after that, and she applies to the Prerogative Court for an Administration as the Widow: The next of Kin of the Deceased appears there, and denies her to be the lawful Widow; in Proof of which she produces the Sentence: Is the Prerogative Court to give Credit to this Sentence or not? If it is to give Credit to it, (as it does daily) the Reason is, because it binds universally as long as it is in Force; for, though they are both Ecclesiastical Courts, there is no more Privy between the Prerogative Court and the Consistory Court of any Diocese, than between the Prerogative and the Court of King's Bench: The Prerogative Court has the mere Cognizance over Probate and Administration; and therefore if universal Credit is not due to the Sentence of the Court which pronounced for the Validity of the Marriage, the Prerogative Court must in the Case supposed go into the Question over again, whether the Party deceased and the Party claiming to be his Widow were married or not married. The Prerogative Court is an Ecclesiastical Court, and proceeds upon the same Rules, so far as they are applicable; it proceeds in the same Manner by Allegation and by written Evidence; the Judge is a Person bred in the same Profession; and the Practisers are the same with those that practise in the Consistory Court of *London*; and therefore there is a Probability that the Prerogative Court in this Case might agree with the Judge of the Consistory in Opinion that the Marriage was a good one, and consequently decree the Administration to the Party praying it as the Widow. What would be the Consequence of that? why, the Party would have had Two Law Suits instead of One, and have got by them Two Pieces of Paper called Sentences, for her Marriage, and Letters of Administration, but she would not be a Bit the nearer getting Possession of the Deceased's Effects; for these she must apply to a Court of Common Law; and there, according to this Doctrine, the First Person she is obliged to bring an Action against will be at Liberty to say, who are you? the Administratrix and Widow. No, I deny that: It is true you have obtained a Sentence for your Marriage and an Administration from the



Prerogative Court as the Widow; but those Sentences were founded upon false Facts; therefore I object to them, and desire there may be a Third Suit, to have it enquired into in this Court, whether there was a real Marriage or not. Now, supposing that in this Third Suit a Jury should be of a different Opinion from the Two former Courts, what would be the Consequence? why, that the Party who brought a Suit for a Debt would be non-suited: So that here would be a legal Administration subsisting (unless the Court in which the Action was brought could repeal it and grant a new one, a Power which I believe no Temporal Court has ever yet exercised) but the Hands of the Administrator would be absolutely tied up, the Effects could never be administered, the Debts of the Testator could never be called in, the Estate could never be distributed. Your Lordships see plainly that the Confusion would be so extreme, if this Doctrine was to prevail, that no Error in a Sentence, however apparent, nor any Inconvenience arising from it to particular Persons, however great, can be a sufficient Cause for any Court to examine into the Merits of a Sentence given in a Matter of which itself has no legal Cognizance; and that there is the utmost Wisdom in those Resolutions which declare, that there is an implicit Credit due from all other Courts to the Sentences of Courts having the proper Jurisdiction over the Matter in which the Sentence has been pronounced.

My Lords, The Cases that I have hitherto mentioned and alluded to have been all in Civil Causes: Will it be said, that the Question now before your Lordships, being in a Criminal Cause, that varies the Case; and that although a Sentence of the Ecclesiastical Court would be binding and conclusive Evidence in a Civil Cause, yet in a Criminal Cause it would not have the same Effect? My Lords, the same Effect I can very readily agree that, according to my poor Notions of Law and Justice, it would not have; but I should think it would have Ten Times greater; and I cannot conceive it possible, that it can be held in any Case, or in any Country in the World, that a Sentence, which would be held to be conclusive Evidence to avoid a Civil Demand against a Person, would not be held to be conclusive Evidence and Defence against a Criminal Prosecution: I cannot conceive that to be possible. *In penalibus Causis benignius interpretandum est*, is a Maxim of universal Law. Undoubtedly it is the Business of all Criminal Judicatures to enquire strictly into Crimes; to punish those Acts which the Law has made criminal, and which are legally proved; but Courts of Law do not strain Points in order to make Crimes, and inflict Punishments; it never was so contended: And I do conceive that many Instances might be enumerated by those who are conversant in the Practice of the Criminal Law, which I am not in the least, in which Parties prosecuted are indulged with peculiar Privileges; I believe that they are not bound by their First Plea: If a Party has been ill advised in his Plea, he is bound down by that in a Civil Cause; but in Criminal Prosecutions the Prisoner may plead over and over again, and is allowed to avail himself of every Nicety in the Law to avoid Conviction.

Upon these Grounds therefore I hope it will appear to your Lordships to be most clear, that the Sentence of the Ecclesiastical Court always has been esteemed and must be allowed to be final, to be the only Evidence that can be received concerning the Fact upon which it has been pronounced, and that the Fact is no longer the legal Object of Enquiry by any other Court. I do apprehend this to be so clearly and fully established, that I can scarce conceive that the Gentlemen will deny it; but I apprehend and do expect that they will endeavour to find a Distinction; and they will say, though we should admit your Rule, that the Sentence of an Ecclesiastical Court is binding so long as it subsists in general, yet if that Sentence was obtained by Collusion and Fraud, it is otherwise; and if it can be proved to have been so obtained, it will immediately lose its Effect. I expect we shall be so told; and I do admit, that to maintain our present Point, which is, that the Sentence is conclusive Evidence, we must say that it is a Rule without any Exception; we must say, that Collusion in obtaining the Sentence would not give your Lordships any Jurisdiction to enquire into the Fact: And I do, with great Submission, contend before your Lordships, that no Court which has not an absolute and an entire Jurisdiction over a Fact, as much as the former Court had, can take Cognizance of a Matter that has been already decided upon in that former Court, upon a Suggestion or even Proof that Collusion was used in obtaining the former Sentence. I may, and I am afraid I shall, talk very ignorantly respecting those Cases in which the Courts of Common Law take Cognizance of Matters which have been already decided upon by other Courts, upon Proof that the Decision was obtained by Fraud and Collusion of the Parties at that Time before the Court. I own I am by no Means Master of that Subject; but I apprehend they are only in such Cases where each Court, suppose the Court of King's Bench and Common Pleas or any other, has an entire Concurrence of Jurisdiction; where there was an Option in the Parties to commence the Suit originally either in one Court or the other, and where

the



the Effect of the Sentence of the Two Courts would be perfectly equal. In such a Case, if after Sentence given in One of those Courts Application should be made to the other to rehear the Matter, on Proof that the former Decision was not fairly obtained, this might be a just Ground for the Court to which Proof of the Fraud is offered, to say, we will hear the Matter over again, which we had a Right to have heard as well as the other Court had, had it not been that the Cause was commenced with them: But I apprehend no Court can do this, the Sentence of which, when it is given, will not have the same legal Effect to the full as the Sentence of the former Court. Nor can it be said that this Court, High and August as it is, or any other Court of Criminal Jurisdiction, can give a Sentence upon a Marriage, which will have all the Effects that the Sentence of the Ecclesiastical Court will have. Strip the Question of its Circumstances, and let it be asked simply, has the House of Lords a Power to try the Validity of a Marriage? Every Body will say at once, it has not. Allow me to consider what would be the Consequence if your Lordships were to take Cognizance of this Matter, and were, notwithstanding the Sentence of the Ecclesiastical Court, upon the Suggestion of Collusion, or any other Suggestion, to say, we are not barred by it, we will go into it; and that the Party tried under such Circumstances should be convicted of Polygamy; what would be the Consequence of that? Would it set aside the Second Marriage? I take it most clearly it would not. Suppose that after the Wife had been convicted of Polygamy for marrying *B.* in the Life-time of *A.* her former Husband (a Sentence against her Marriage with *A.* having First been obtained in the Ecclesiastical Court) she should by any Means become entitled to a Fortune, by Legitimacy or otherwise, would not *B.* have a Right to demand the Legacy, or any other Effects that came to the Woman subsequent to the Conviction? I submit to your Lordships, he certainly would. Suppose *B.* to die intestate, might not the Wife, notwithstanding such a Conviction as this, pray the Administration to his Effects? And if her Interest as Widow was denied, as having been the Wife of *A.* at the Time she married *B.* and she in Reply to this should produce the Sentence in the Ecclesiastical Court against her Marriage with *A.* bearing Date prior to her Marriage with *B.* the Court could not refuse to grant Administration to her. Suppose that after the Conviction the Parties to the Second Marriage should continue to cohabit, and should have Children, would not they be entitled to the Inheritance as the legitimate Issue of the Second Marriage? I take it, that under the Authority of the Cases of *Bunting* and *Leppingwell*, *Kenn*, and the Rest that have been since determined conformably to those Cases, there cannot be a Doubt that they would, if a Question should arise upon the Right to the Inheritance in a Court of Common Law, so long as the Ecclesiastical Sentence against the First Marriage remained in Force: In short, the Conviction would have no Operation at all upon any Civil Effect of the Second Marriage. The Consequence therefore of proceeding to convict for Polygamy for a Second Marriage, in a Case where there had been a Sentence of the proper Ecclesiastical Court against the First, would be, that a Woman who had been convicted of Felony for marrying, might under that Criminal Act (as it would then be pronounced to be) derive to herself all the Privileges and Advantages that accrue to a Wife in the Fortune of her Husband by a lawful Marriage, and convey a Title to her Issue to the greatest Honours and Estate in the Kingdom. These are such glaring Contradictions and Absurdities, as I should with great Deference apprehend, that neither your Lordships, nor any other Court of Justice would give Occasion to, without the utmost Reluctance. There is a Case or Two which have not yet been mentioned, and which appear to me to be extremely material, to shew the extraordinary and unusual Steps that have been sometimes taken by Courts, and in Cases extremely similar to the present, to avoid a Contrariety of Sentences of Courts having different and distinct Jurisdiction. In the Case of *Boyle* and *Boyle*, in the King's Bench in 1687, reported 3d *Mod.* 164. A Libel was admitted in the Spiritual Court against a Woman *Causa Jactitationis Maritagii*, the Woman prayed a Prohibition to the Ecclesiastical Court; and the Suggestion was, that this Person, who now libelled against her in a Cause of Jactitation, had been indicted at the Sessions in the *Old Bailey* for marrying her, he having a Wife then living; that he was thereupon convicted, and had Judgment to be burnt in the Hand; that therefore they had no Right to proceed, and therefore a Prohibition was prayed. Serjeant *Levintz* in that Case moved for a Consultation, because no Court but the Ecclesiastical Court can examine the Marriage: Upon the contrary it was said, that if a Prohibition should not go, then the Authority of these Two Courts would interfere, which might be a Thing of ill Consequence: That if the Lawfulness of this Marriage had been First tried in the Court Christian, the other Court at the *Old Bailey* would have given Credit to their Sentence, and upon this Ground and this Principle merely, that there might be a Contrariety of Sentences, which would be mischievous. The Court went certainly a great Way, for it prohibited the Ecclesiastical Court from



proceeding in a Marriage Cause *inter vivos*, of which it has the clearest and most uncontroverted Jurisdiction.

My Lords, Another Case was that of *Furfsman* and *Furfsman*, which began in the Consistory Court of *Exeter*: It was a Cause of Restitution of Conjugal Rights brought by the Woman; the Libel was admitted; and then there was an Appeal to the Court of Arches; the Judge pronounced for the Appeal, and was proceeding upon the Merits of the Cause; but upon the 4th of *November* 1727, he was served with a Prohibition; and the Ground for obtaining this Prohibition was, that *Sarah Furfsman*, pretending to be the lawful Wife of the said *Furfsman*, had indicted him for Bigamy in marrying another Wife, and failed in Proof of her own Marriage; whereupon the said *Furfsman* was acquitted; and therefore it was said the Ecclesiastical Court should not proceed. Now, my Lords, if a prior Judgment given by a Court, in a Matter in which it can have only an incidental partial Jurisdiction, is a sufficient Cause for stopping all subsequent Proceeding in the same Case, even in the Court which has the entire ordinary Jurisdiction over the Question, on account of the ill Consequence that would ensue from the Interference of the Authority of the Two Courts; surely, by all Parity of Reasoning, in a Case where it appears that the Court, which the Law and Constitution have entrusted with the entire Jurisdiction over the Matter in Question, has already taken Cognizance of it and pronounced its Sentence, the Court of incidental Jurisdiction will give Credit to such Sentence, and conform its own Sentence to it.

If the ill Consequences arising from clashing and contradictory Judgments of different Courts may be allowed to have any Influence upon your Lordships Judgment in this Matter, there is no Need to rack the Invention for Circumstances that might happen; the Case before your Lordships need but be plainly stated, to shew those Inconveniencies in the strongest Light. The Sentence of the Ecclesiastical Court pronouncing and declaring the noble Prisoner to be free from all Matrimonial Contracts with Mr. *Hervey*, was given in *February* 1763: Soon after she married the Duke of *Kingston* under the Dispensation that is usually granted for the Marriage of Persons of that Rank. Under this Marriage the Duke and Duchess cohabited between Four and Five Years as Husband and Wife, at the Expiration of which the Duke of *Kingston* died, having first made his Will, by which he gave the most affectionate and most honourable Testimony of his considering her as his Wife. At last in *July* 1775, comes a Bill of Indictment, which is to set the Sentence of the Ecclesiastical Court entirely at nought, and to brand this open and solemn Marriage, confirmed by a Cohabitation and Reputation of so many Years, with the Name of a Felony.

My Lords, If this Indictment should be proceeded upon, and the Fact of the First Marriage found differently from what appeared to the Chancellor of *London* at the Time of pronouncing his Sentence upon it, the Confusion, the Scandal (I think I may venture to call it) that would arise from the Contrariety of the Two Sentences that would then be pronounced, and both still in Force, would be such, that I cannot conceive that any Court of Justice would hazard it, upon any Suggestion or Apprehension of Error in the former Sentence, or Fraud in obtaining it, and which was irremediable by any other Means, or any other the most striking or plausible Argument that could be urged to induce them to it. But the Plea of the Necessity of doing an extraordinary Act to set aside an improper Sentence, or the Effect of such a Sentence, is certainly less applicable to the Ecclesiastical Court, than to any other Court known in this Kingdom; and least of all is it applicable to their Proceedings in Marriage Causes. There is a Course of Appeal, in the Ecclesiastical Courts, a Deliberation in their Proceedings, that is unknown to any Court in this Kingdom; from the Archidiaconal Court (if the Cause be originally instituted there) to the Consistory of the Diocese; from thence to the Metropolitan Court, which is the Court of Arches; from thence to the King in his Court of Chancery; from which a Commission of Delegates to hear Appeals, issues *ex debito justitiæ*: In every One of these Courts the Parties are not bound down to what has been given in Evidence in the Court below: It is not merely Error in Law, but Error in Fact likewise may be corrected upon Appeal in the Ecclesiastical Court; and if there are any Facts material to the Point in Issue, that have not been pleaded and examined to in the inferior Court, they may be pleaded and given in Evidence in the Court of Appeal; and so down to the last Court. Besides this, in every One of these Courts it is not a Matter confined to the Two Parties that institute the Suit, and therefore may carry it on collusively; for in any Period of the Cause a Third Person, that has any Interest in the Matter in Question, if he sees that the Two original Parties are colluding, or that One of them is negligent, or if he has any other Reason to be dissatisfied with the Manner in which the Business is conducted, he may intervene for his Interest, and the Court must *ex debito justitiæ* admit him to do so; he may give in a Plea, if he intervenes before the Cause is concluded; he



may examine his own Witnesses, and act in all Respects as a Party in the Cause. What possible human Means of providing against Collusion and Surprize is omitted out of this Method of Proceeding! But, my Lords, even this is not all; for when the Cause has run this great Length, Application may be made to his Majesty in Council, who, if he is advised that there is a Ground for it, has a Power *ex gratia* to grant a Commission to review the whole Matter over again. From this View of the Method of Proceeding in Ecclesiastical Courts, I apprehend it will appear to your Lordships, that they are not so ill provided with Means either to avoid, or to reform Errors in their Judgments, as to stand in need of the extraordinary Interposition of other Courts, in any Matters that are properly within their Jurisdiction; but least of all is this necessary in a Marriage Cause, for a Marriage Cause is never at an End: Let the Cause have been argued ever so often, let it have been sifted with the most scrupulous Exactness and Attention, let there have been One or more Appeals, let every Step have been taken that can be taken to give a final and conclusive Judgment, still the same Party may come before the Court, and say, the Court has been imposed upon; I desire this Matter may be examined over again: The Court, upon such Application, would and must take Cognizance of it.

I will trouble your Lordships with quoting but One Authority for this, which is that of *Sauchez* in his Treatise de Matrimonio, Lib. 7. Disp. 100. C. 1. who lays it down in these positive and explicit Terms: “*Id in Matrimonio speciale est, ut Sententia in Conjugalī Causa lata, quacunque circumspeditione præmissa, sive bis ab ea provocatum fuerit confirmataque sit, sive lapsus terminus ad appellandum sit, nunquam transeat in rem Judicatam, ac proinde non ita efficacem auctoritatem sortiatur, quin retractanda sit, quoties compertum fuerit eam errore quodam latam fuisse.*” And the Reason assigned for making this material and singular Distinction between Marriage Causes and all other Causes is, that in general the Content of the Party who does not appeal from a Sentence which is given against him, gives Force and Authority to the Sentence, though there might otherwise be a Ground for him to complain of it. But, says the Author before quoted, “*Sententia per Errorem lata in Causa Conjugalī, transiens in rem Judicatam, foveret peccatum, separando veros conjuges, vel uniendo eos qui tales esse nequeunt: At nullum vinculum quantumcumque multiplicatum, potest firmare actum ex quo peccatum consurgit.*”

The same Doctrine is laid down in a Multitude of other Writers upon the Canon Law, of which there are Waggon Loads; but they are unanimous in establishing the Maxim, “*Sententiam in Causa Matrimoniali nunquam transire in rem Judicatam;*” which I am sure your Lordships will not hear denied or disputed by the other Side.

From hence it will appear to your Lordships, how little Ground there is for that Notion which seems to have got Abroad, that the Proceedings of the Ecclesiastical Courts in Causes of Jæstitation, or any other Causes, are such as tend to loosen the Bonds of Matrimony (which both in a Civil and Religious Light without Doubt is the most essential Bond of Society) and give Parties an Opportunity of dissolving it at their Pleasure. The Court in these, as in all other Cases, must determine *secundum Allegata et Probata*, according to the Evidence before it: But where is the Encouragement given to Parties to collude, or what Security can they have under a Sentence obtained by Fraud, when that Fraud may at any future Time be detected, by bringing forward that Evidence which was before withheld, and upon Proof that the former Sentence was erroneous, another of a direct contrary Tendency will be given?

My Lords, The Marriage, which is the only Fact in Dispute in the present Case, has many Years ago been put in Issue in the proper Manner in the proper Court, and a Sentence given against it as decisive as any that Court can give in a Marriage Cause: Upon Trust and Confidence in that Sentence it was, that the Act was done for which the noble Prisoner is now accused before your Lordships; the Sentence is produced, remaining in full Force; and for the Reasons that have been urged, we humbly hope your Lordships will be of Opinion, that it is the only legal Evidence that can now be given respecting the Fact upon which the Accusation is founded, and that your Lordships will therefore receive it in Bar of any other.

Then the Lord High Steward returned back to the Chair.

*Lord President of the Council.* My Lords, I move your Lordships to adjourn to the Chamber of Parliament.

*Lords.* Ay, ay.

*Lord High Steward.* This House is adjourned to the Chamber of Parliament.



The Lords and others returned to the Chamber of Parliament in the same Order they came down, except the Lord High Steward, who walked after his Royal Highness the Duke of *Cumberland*; and, the House being thus resumed, Resolved to proceed further in the Trial of *Elizabeth* Duchess Dowager of *Kingston*, in *Westminster-Hall*, To-morrow at Ten of the Clock in the Morning.

TUESDAY, APRIL 16. *The Second Day.*

THE Lords and others came from the Chamber of Parliament in the same Order as on *Monday*, except the Lord High Steward, who walked after his Royal Highness the Duke of *Cumberland*, and the Peers were there seated, and the Lord High Steward in his Chair.

*Lord High Steward.* My Lords, The House is resumed. Is it your Lordships Pleasure that the Judges may be covered?

*Lords.* Ay, ay.

Then the Serjeant at Arms made Proclamation for Silence as usual; and the Duchess of *Kingston* being conducted to the Bar,

*Lord High Steward.* Mr. Attorney General, you may proceed.

*Mr. Attorney General.*

MY Lords, I find myself engaged in a very singular Debate; upon a Point perfectly new in Experience, analogous to no known Rule of Proceeding in similar Cases, founded on no Principle, none at least which has been stated.

The Prisoner, being arraigned upon an Indictment for Felony, pleaded Not Guilty; upon which Issue was joined. In this State of the Business she hath moved your Lordships, that no Evidence shall be given or stated to prove that Guilt upon her, which she hath denied and put in Issue.

The only Case cited in Support of so extraordinary a Motion, that of *Jones and Bow, Carth. 225*, bears no Relation or Proportion to it. In the Trial of an Ejectment, the Defendant, admitting the Plaintiff's Title to be otherwise clear, avoided it by a Sentence against the pretended Matrimony of his Mother with Sir *Robert Carr*; after which both Parties married with other Persons; a Sentence, unimpeached in Form or Substance, against his own Mother, from whom he was to derive Title to his State; decisive consequently as a Fine with Non-claim, or any other perfect Bar; and submitted to accordingly; for the Plaintiff was called, and did not appear. Here, if the Sentence should ever come properly under Examination, it will appear to differ in all those Respects.

In the mean Time, instead of defending, this Motion is only putting Questions to your Lordships, hypothetically, for Opinion and Advice how to order the Defence. If this Sentence be, as they argue it, a definitive and preclusive Objection to all Enquiry, the Prisoner ought to have pleaded it in Bar, and to have put the Prosecutor upon dealing with her Plea as he should be advised; or she may still rely upon it in Evidence of Not Guilty. But without placing any such Confidence in it themselves, they call upon your Lordships to make it the Foundation of an Order to stop the Trial.

My Lords, To say that this is wholly unprecedented, goes a great Way to conclude against it. To say that such a Rule would be inconsistent with the Plea, and repugnant to the Record as it now stands, seems decisive. After putting herself for Trial upon God and your Lordships, she beseeches you not to hear her tried. But I shall not content myself with this Answer; because, as your Lordships have thought proper to hear Counsel in Support of this extraordinary Motion, I am bound to suppose it a fit Subject for Argument, and to lay before your Lordships my Thoughts upon it as they occur.

Before I go into particular Topics, I cannot help observing, with some Astonishment; the general Ground which is given us to debate upon. Every Species and Colour of Guilt, within the Compass of the Indictment, is necessarily admitted. So much more prudent it is thought to leave the worst to be imagined, than even to hear the actual State of her Offence. Your Lordships will therefore take the Crime to be proved in the broadest Extent of it, with every base and hateful Aggravation it may admit; the First Marriage solemnly



solemnly celebrated, perfectly consummated; the Second wickedly brought about by practising a concerted Fraud upon a Court of Justice to obtain a collusive Sentence against the First; a Circumstance of great Aggravation. When *Parr* and *Chadwick* defended a burglarious Breaking and Entering, under a Pretence of an Execution, upon a Judgment fraudulently obtained against the casual Ejector, it was thought to aggravate their Crime, and they suffered accordingly. I allude to the Case in *Kelyng*, 43.

My Lords, I take the Ground so given me with this Reserve, not that I wish to have her Crime implied, from the Conduct she is advised to hold here, to all Purposes and Conclusions; but that the Necessity of the Argument obliges me to assume it, as plainly and distinctly confessed, while this Sentence is urged as an irrefragable Bar to the Trial, whatever may be the Degree of her Guilt, however such a Sentence may have been obtained, and whether it tends to aggravate that Guilt, or to extenuate it. The Proposition looks so enormous, that it requires great Abilities to give it any Countenance, and the most irrefragable Argument to force the Conclusion.

I must also remind your Lordships again, that the Sentence has been read in this Stage of the Proceeding, by the Consent of the Prosecutor, and under the express Reservation of his Right to object to the Competence of it, as Evidence on the Issue joined, unless he should think fit to make it Part of his own Cause. At present it stands admitted merely as the Ground of this previous Motion. The Sentence being collusive, is a Nullity. If fair, it could not be admitted against the King, who was no Party to the Suit. If admitted, it could not conclude in this Sort of Suit, which puts both Marriages in Issue. The Objections arise from the general Nature of the Sentence propounded, which is never final; from the Parties, who could not, by their Act, bind any but themselves, or those who are represented by them, or at most those who might have intervened in the Suit; from the Nature of the present Indictment, which puts the Marriage directly in Issue; from the Circumstances peculiar to this Sentence, which prove it to be collusive.

Without adverting much to those Particulars, the learned Counsel for the Prisoner affected to lay down an universal Proposition, that all Sentences of peculiar Jurisdictions are not only admissible, but conclusive Evidence; and referred to many Cases, of which I shall controvert nothing, but the Application.

The Case of *Burroughs* and *Jemineau*, 2 *Str.* 733, is nothing to this Purpose. That was a supposed Contract by accepting a Bill of Exchange at *Leghorn*; which Acceptance was void by the peculiar Laws of that Country, because the Drawer had failed without Assets in the Hands of the Acceptor; and was pronounced to be so by a competent Court in *Leghorn*. The Plaintiff insisted upon it; because, if the Acceptance had been made here, it would have bound. But, according to the Law of the Place where it was made, the Acceptance did not constitute a Contract. The Plaintiff might, if he had been advised otherwise, have defended that Suit; he acquiesced in the Decision.

Courts of Admiralty sit between Nation and Nation. They proceed *in Rem*, and they bind the Property, not only against the apparent Possessor, but all the World; or else the very Existence of the Court would be subverted. Any Body may claim; and proper Monitions issue for that Purpose. Therefore, in the Case of *Hughes* and *Cornelius*, the Plaintiff failed in his Action of Trover; although the Verdict found his Property, and consequently the Sentence of the *French Admiralty* erroneous; because the Court had no such Jurisdiction over that Sentence. For the same Reason, in *Green* and *Waller*, the Sentence of the Admiralty could not be gain-said. There is no Appeal but to the Sword.

The same Principle governs as to Seizures in the Exchequer; where any Person may come in and claim; which if they neglect, they tacitly assent to the Condemnation. So of Seizures tried before the Commissioners of Excise.

So in the Case of *Moody* and *Thurston*, 1 *Str.* 481, where an Act of Parliament gave an Action (on a Certificate of Commissioners that Money was due from an Agent to Officers of the Army) the Agent could not defend, by controverting the Truth of the Certificate. It was contrary to the Act, and he might have been heard before the Commissioners.

Where a Soldier had complained of his Major for undue Correction to a Court Martial, which dismissed his Petition, he could not maintain an Action, for he had been heard in a Court competent and final to that Purpose.

No temporal Remedy lies to recover Possession of a Benefice forfeited by Deprivation, while the Sentence of a Court competent to declare the Forfeiture remains in Force.

The same Rule holds as to derivative Claims. Therefore the Judgment of *Ouster* against a Mayor is good Evidence against the Corporator, who claims under him.



Those who enter into collegiate Establishments agree to submit themselves to the Laws and Magistrates appointed by the Founder; and consequently cannot reclaim against them. This was all which was determined in *the King and New College*, and many other Cases which might have been referred to under the same Head. In most, if not all, the Cases cited, the Parties had actually been heard before the proper Tribunal.

The Office of granting Probate and committing Administration is a special Authority committed to the Ecclesiastical Courts, where all, who claim Interest, may be heard; so there can be no Defect of Justice. Therefore, in a vast Abundance of Cases from *Noel and Wells* soon after the Restoration, to *Barnsley and Powell* in Lord *Hardwick's* Time, the Temporal Courts have refused to take Cognizance of the Right of personal Representation. All the Cases under this Head prove no more.

Cases were also cited to prove, that Issues joined upon the Lawfulness of Marriage, Profession, general Bastardy, and so forth, must be tried by the Bishop, and to infer that his Jurisdiction is exclusive; and the Statute of 9 H. VI. c. 11, was cited to prove, that it is final not only to Parties and Privies, but to Strangers. The Effect of that Statute is rather to prove, that all the World are, or may be, Parties or Privies. The only public Object of it is to provide sufficient Notoriety to make them privy in Fact, as well as in Law. It provides a great Variety of Proclamations, to the End "that all Persons, pretending any Interest to object against the Party which pretendeth himself to be Mulier, may sue to the Ordinary, to whom the Writ of Certificate is or shall be directed, to make their Allegations and Objections against the Party which pretendeth him to be Mulier, as the Law of holy Church requireth." For the Rest, the Statute seems to have been an Act of Violence and Fraud, by the powerful Pretenders against Lady *Audley*. The Mischief, they affected to dread, could not happen. A Certificate is utterly void, unless made upon Process, at the Instance of the Parties. The Certificate of Mulierty binds the Parties to the Suit (as in all Reason it ought, while such a Trial is tolerated) but nobody else: And so it had been often decided before; and yet the Statute provided that every such Writ and Certificate at the Suit of Lady *Audley* should be void. On the other Hand, no such Issue as Profession, Bastardy, or lawful Matrimony, could be tried by the Bishop between Strangers; and when tried by the Country, it bound only those who were Parties to the Trial and Attaint. Nor was an Infant bound to answer a Plea of general Bastardy. But whether the Conclusion was too extensive or not in these Cases, still it was only in respect to a Civil Right, and tried by a competent Jurisdiction, sitting for the express Purpose of deciding upon it, the Jurisdiction being created and established by the Writ.

Sentences, which are given by the Bishop or his Official of his own mere Authority in Matrimonial Causes, have the least Pretence of all others to bind or influence any Question which may arise afterwards in Judicature. Such Causes punish no Crime, try no Right, proceed to no Civil Effect. They proceed *pro salute animæ Rei*, to reform some Enormity or Neglect in religious Life; in *qua* (says *Covarruvias* in his Epitome of the Fourth Book of the Decretals, Par. 2, C. 8, S. 12, N. 1.) *de maximo Sacramento agendum est*. The Process is, *simpliciter, de plano, sine Strepitu et Figurâ Judicii*, *Clement. Lib. 2, T. 1. S. 2*; From the very Nature of such a Cause, it must follow, that the Judgment cannot be final, No Consent of Parties, or Omission to appeal, or repeated Affirmation of the same Judgment, gives it any Force. *Quia Sententia illa Transiens in Rem judicatam foveret peccatum, seperando veros Conjuges, vel uniendo eos, qui tales esse nequeunt. At nullum vinculum, quantumcunque multiplicatum, potest firmare Actum, ex quo Peccatum consurgit.* *Sanch. de Matrim. Lib. 9, Disputat. 100.* In the same Disputation *Sanchez* says, *Potest etiam Judex, ex officio, Parte invitâ, procedere ad retractandam hujusmodi Sententiam; imo ad id teneri Judicem probat Textus; quia sui interest Peccata auferre. Hinc deducitur, certâ Regulâ prescribi minime posse, quoties audiendus sit volens prædictam Sententiam impugnare.* He illustrates the Doctrine, by observing, that in *Costs*, which is a Civil Interest, a Matrimonial Sentence is binding. *Ratio est aperta: Sententia enim Matrimonii ideo non transit in Rem judicatam, ne foveretur Peccatum, sustinendo Matrimonium Irritum, aut dissolvendo validum; quæ Ratio in Expensarum Condemnatione cessat; et ideo sortitur Naturam aliarum Sententiarum, quæ in Rem judicatam transeunt.* *Gaill*, in his *Observat. 107*, and *Obs. 112*, holds exactly the same Language.

The same Rule obtains, for the same Reasons, in all Sentences *pro salute animæ*. A Sentence is inconclusive (says *Vulteius* in his Treatise *de Judiciis*, Lib. 3, C. 12, S. 38.) *ex Qualitate Cause; puta, quod est Matrimonialis, vel alia quæcunque, in quâ Animæ Periculum versatur.* *Scaccia*, a very authoritative Writer on the Effect of Sentences, in his Book *de Sententia Gloss. 14, Quest. 2, N. 44*, observes as a general Rule, *Sententia, in quâ vertitur*



*animæ periculum, nunquam transit in rem Judicatam.* The Sum of their Maxims is given by Oughton, Tit. 205. which is taken almost literally from *Conssett*, and by him extracted from the Books of Practice.——“ Although, generally, Witnesses are not admitted after Publication, yet in a Matrimonial Cause they are, even without Oath, that they are come to the Knowledge of the Parties after Publication. And, supposing that Sentence has passed against the Plaintiff, that he has failed in Proof of his Libel, and the Defendant is acquitted; yet the Plaintiff may either in the same Cause, or in another, raise a new Suit against the same Person, not only on a new or second Contract, but on the former, and produce Proofs known or unknown to him before: And he is not bound by the *Exceptio rei judicatæ*, or that the former Sentence has passed *in rem Judicatam*; because a Sentence given in a Matrimonial Cause never passes *in rem Judicatam*, and has many Privileges. When the Church is deceived in promulging Sentence against Matrimony, the Sentence may be revoked by new Proofs, and even by the same; and the Reason is, to eschew Sin and Danger to the Soul if a wrong Sentence should prevail.”

*So far as it appears to us* is therefore no idle Form of Words, but an express Reservation of a necessary Power to alter the Sentence whenever it shall appear to the Bishop that a different Rule of Life is necessary *pro salute animæ Rēi*.

The Mistake seems to have arisen from considering the Bishop as a Court of Civil Judicature, and his Sentence as pronounced upon the Trial of a Civil Right. In this perverse View, those Maxims are absurd, and those Rules merely vexatious, which, tried by the real Nature and End of a Matrimonial Suit, are founded in Piety and Zeal for the Discipline of Religion. In all Civil Causes the Maxim is universal, *Expedit Reipublicæ, ut finis aliquis sit Litium*. In Proceedings *pro salute animæ*, the Reason of the Thing is altogether on the other Side.

Even in the Moment of stating these Sentences to be conclusive, One of the learned Counsel could not forbear to give your Lordships a lively Representation of the Frivolousness of their Proceedings and the Vanity of their Decrees. The Doctors have been at the Pains to write (says my learned Friend) some Waggon Loads of Volumes to prove, that these Matrimonial Causes proceed to no End, and terminate in nothing. All Parties, all Privies to the Suit, all who have Interest in the Matter of it, may prevent its Effect by Intervention, by Citation to hear the Decree reversed by original Libel. The Sketch was drawn with a great Deal of Humour, bordering upon Ridicule: A Vivacity natural enough within the Walls of their own College. *Vetus illud Catonis admodum scitum est; qui mirari se aiebat, quod non rideret Haruspex, Haruspicem cum vidisset.* Yet it seemed rather astonishing, that so very judicious an Advocate should think this Picture of Futility the best Recommendation of the Sentence to your Lordships as an absolute Conclusion upon all your Proceedings. Here all the World shall be bound by that Judgment, which the Court, who pronounced it, hold for no Judgment, and will suffer to bind nobody. But such was the Necessity of the Argument; to give it any Effect, they were forced to assume, that this Sort of Sentence is the Judgment of a Civil Judicature upon a Civil Subject, which is not true; and to give it Effect against others than Parties, they were forced to admit, that such others may set it aside; which is true, only because it is no such Judgment.

In Support of this loose Proposition, they cited from our own Books several Cases, in which the Temporal Courts suffered themselves to be concluded by such Sentences.

If it were necessary or allowable at this Day to reason against so many Authorities, I should incline to think, that those Cases proceeded upon the Mistake I mentioned before, namely, that the Ecclesiastical Court try and pronounce upon the Civil Right of Marriage, or ever mean to do so, except when authorized by Writ of the King's Courts. But for the Purpose of the Argument I will suppose that they do; even then the Effect of all the Cases will amount to no more than this. First, the Ecclesiastical Jurisdiction has (exclusively) Conusance of the Right of Marriage. Secondly, the Secular Jurisdiction has Conusance of the Temporal Interests, which are incident to Marriage, and, in order to decide upon them, must try the Fact of Marriage as Part of the Question. Thirdly, but the Judgment of the Ecclesiastical Jurisdiction on the Principal, *viz.* the Right of Marriage, wherever it occurs, is final upon the Trial of the Incident. Fourthly, this Conclusion extends to all who were Parties or Privies, or who, in Notion of Law, have committed Laches in not intervening or reclaiming. This I take to be the utmost Extent of the Cases cited.

The earliest Case referred to was *Corbett's*, Fitz. Tit. Consultation Pl. 5. Sir Robert Corbett had issue Roger by his Wife Matilda; in whose Life he married Letitia, and had issue Robert. Roger sued in the Court Christian to avoid the Second Marriage, but was prohibited, for that Court had no original Jurisdiction. “ Otherwise,” says *Catesby's* Justice, “ if my Father and Mother, were divorced, married to others, had Issue, and died. Then I grant well, “ that



“ that I shall have my Suit originally in the Court Christian, because I cannot have my  
 “ Action in the Temporal Law, as Heir, during the Divorce; and also the Divorce is a  
 “ Spiritual Judgment, which shall be reformed in the Spiritual Courts.” So it was  
 doubted, whether “ the Brother of a Monk, who abandoned his Habit and Vows, could;  
 “ as Heir, libel to try his Brother’s Profession, and hold him to Obedience; for he might  
 “ have his Action by the Temporal Law, and object his Profession.” But it was agreed;  
 “ That if the Monk had been deraigned for false or unjust Cause, the Brother might have  
 “ Citation to revoke his Deraignment.” If this proves the Effect which a Spiritual Sentence  
 upon the principal Matter, the Right of Marriage, or Profession, has in Cases where these  
 come incidentally into Question, it also confines the Extent of that Effect to those Persons  
 who may rescind the principal Sentence; and proves the Reason of it, namely, that they  
 are not wronged by the Conclusion, because they may always be heard against it.

The next Case was *Bunting and Leppingwell*, 4 Co. 29. a. and *Moor* 169; which was thus  
 found by Special Verdict. *Thomas Twede* married, *de Facto*, *Agnes Adinghall*, but under the  
 Impediment of a Pre-contract between her and *John Bunting*. *Bunting* sued in the Court  
 Christian on this Pre-contract, obtained Sentence for Celebration *in facie Ecclesie*, married her;  
 and had Issue Two Sons, *Charles* and *Robert*. *Richard*, the Father of *John*, gave Lands to  
*Robert*, for Life only. *Robert*, mistaking his Title, settled them on *Emma* his Wife, and died.  
*Charles* brought an Ejectment, as Heir to *Richard*, his Grandfather. It was objected that *Twede*  
 had been no Party to the Suit in the Court Christian. But *Twede* might have intervened, or  
 reclaimed, all his Life long. So might *Emma*, if it could have availed her to prove her  
 Husband illegitimate, which would have destroyed her Title. But *Twede* had abandoned  
 his Pretensions. The Sentence was submitted to by *Agnes*. The Marriage was solemnly  
 celebrated; and remained uninterrupted during Life. The Question was between Two  
 Issues. It required little Argument to sustain the Legitimacy.

The next was *Kenn’s Case*, 7 Co. 68. Cro. Ja. 186. An *English* Bill was brought in the  
 Court of Wards; praying Leave to traverse an Office, whereby *Elizabeth* was found the  
 Infant Heir of *Christopher Kenn*, and whereupon the Wardship had been granted to *Florence*  
 the Mother of the Infant. *Christopher Kenn* had married *Elizabeth Stowell*, by whom he  
 had Issue *Martha*, who left Issue *Elizabeth* the Plaintiff, his Heir at Law, if the Marriage  
 had stood; but in the First and Second of *Philip* and *Mary* the Court of Audience pro-  
 nounced the Marriage void for Want of Age, and gave Sentence of Divorce. *Christopher*  
*Kenn* married *Elizabeth Beckwith* in the 5th of *Elizabeth*. She libelled him for Jactitation  
 before the Commissioners for Ecclesiastical Causes, alledging his former Marriage. *Elizabeth*  
*Stowell* intervened for her Interest. The First Marriage was a Second Time pronounced  
 void, and Sentence followed *ad exequenda Conjugalia obsequia*. After the Death of *Elizabeth*  
*Beckwith*, *Christopher* married *Florence*, by whom he had the Ward. This Matter was  
 referred to all the Judges, who pronounced the Sentence conclusive, so long as it should  
 remain in Force. And Lord *Coke* relied upon *Corbett’s Case*, the Doctrine of which has been  
 explained before. The Point had been Twice tried with *Elizabeth Stowell*, the Grandmother  
 of the Plaintiff, and the Sentences remained, open to Litigation, but submitted to.

The Case of *Jones and Bow*, *Carth.* 225, it has been observed before, was of exactly  
 the same Sort. The Plaintiff claimed under the Issue of Sir *Robert Carr* by *Isabella Jones*,  
 between whom a Sentence had obtained against the Pretence of Marriage, which then stood  
 unlitigated.

In *Jessum and Collins*, 2 *Salk.* 437, there was a Sentence against the Plaintiff in the  
 Spiritual Court, at the Suit of the Defendant, on that very Contract, for which he brought  
 his Action on the Case, without disputing the Sentence.

The Case of *Hatfield and Hatfield* was also cited; a Judgment of your Lordships in the  
 Year 1725. No Authority is more conclusive than the Judgment of such a Court, when  
 the Point decided is well understood: But nothing is more uncertain than the State of a Point  
 drawn from the printed Cases, where each Party takes Care to state, at least; a probable Case;  
 and in the Multitude of the Reasons, good perhaps in Law, if they were true in Fact, it is  
 difficult to divine what the House went upon. If this Judgment depended, as the Counsel for  
 the Prisoner contended, upon the Goodness of the Marriage, it carries the Matter no further  
 than Abundance of other Cases; namely, that the Sentence of a Court Christian, while no-  
 body contests it, binds the Right of Marriage between Parties disputing elsewhere an  
 incidental Interest under it. There was an Attempt, to make it prove a collusive Sentence  
 available, which I shall have Occasion to examine hereafter.

In *Cleeve and Batburst*, 2 *Str.* 960, and *Annaly* 11, the Sentence was against the very  
 Plaintiff in the Cause, and remained uncontroverted.



So *Da Costa* and *Villa Real*, 2 *Str.* 961, or *Mendez* and *Villa Real*, *Annaly* 18, was a Sentence uncontroverted between the same Parties.

The like Observation occurs upon Mr. *Hervey's* Case.

In *Blackburn's* Case, 1 *Salk.* 290, the Sentence was not held to be conclusive; and as to Lord *Holt's* Doctrine, that must suppose the Marriage put in Issue between the same Parties; for otherwise the Sentence would not have concluded; the Court, which grants Administration, having no direct Jurisdiction in Matrimony.

In *Millesent* and *Millesent*, cited by Dr. *Lee* in Lord *Annaly* 11, which I take to have been an Appeal from the Prerogative Court, a Sentence of the Consistory Court against a Marriage was, while it remained unlitigated, a Bar to the Woman, who had been Party to that Sentence, from claiming Administration as Wife.

Upon all these Cases I shall repeat but One Observation; namely, that they bound only those who had been Parties to the former Sentence, or who derived under such Parties. If they had extended to such as might have become Parties by Intervention or Citation, the same Principle would equally have borne them out. The general Peace and Happiness require, that there should be some Resort to hear and determine upon Rights. The same Peace and Happiness require, that Litigation should have some End. The Line seems to be fairly drawn, where every Claim to every Right has had the full Opportunity of being heard. But, among all the Cases cited or referred to, I believe none is to be found, where a Sentence has been taken for conclusive against Persons, who neither had, nor could possibly have agitated it.

It is not enough therefore to establish the Proposition, that such Sentences bind all who have or could have interposed, unless it had been shewn that the King could have interposed, for the Publick Good, in order to see that no Fraud should be practised, which might tend to defeat the Execution of his Laws or Police: But it is not pretended that the King can interpose in such Causes.

It is not enough that a Court of exclusive Civil Jurisdiction, pronouncing upon the principal Right, binds all the derivative or incidental Interests. It should be shewn, that such a Court binds also to Criminal Conclusions: Now this I take to be impossible, because, on the very State of the Proposition, the Court has no Criminal Jurisdiction.

It has often been attempted in Argument to shew, that their Courts have no more than a Censorial Jurisdiction in their Proceedings *pro salute animæ, et reformatione morum*; and to infer from thence that their Judgments ought not to bind in Questions touching Civil Rights; as in *Mendez* and *Villa Real* in *Annaly*: But our Courts have taken the Fact to be otherwise, and considered their Sentence as a Judgment upon the Civil Right, which is the Reason, why it binds all incidental Interests in other Courts of Civil Jurisdiction. The true Reason, why such Judgments have no Effect in a Criminal Court, seems to be this, that there is nothing in common between the Jurisdictions, so that they can never clash. A Judgment in a Civil Suit will bind to all its Consequences, although every Fact, upon which it proceeded, should be evidently false; and though a Criminal Court should have found a Crime upon an opposite State of the Case. An Action and an Indictment for a Trespass may have contrary Issues, and yet both must stand: So it would be if the Crime were assigned in the very Falshoods, by which the Civil Court was deceived; as in Indictments for Perjury or Forgery. A Judgment upon a Deed, after Verdict on *non est Factum* pleaded, is no Bar to an Indictment for forging, or publishing, or swearing to the Deed. The Case would be the same in respect to a Will of Lands established by Verdict, or to a Will of Personalty after Probate.

It was in this last Instance they attempted to shew, that the Authority of the Ecclesiastical Court had been interposed between public Justice and the Crime of Forgery. For this Purpose they have cited the Case of *the King* and *Vincent*, 1 *Str.* 481. It is very short: "Indictment for forging a Will relating to Personal Estate; and on the Trial the Forgery was proved; but the Defendant producing a Probate, that was held conclusive Evidence in Support of the Will." Now the Support of the Will was not in Question. It was proved in common Form, which is not binding, even in the Spiritual Court. 1 *Ro. Rep.* 21. More Particulars of this Case may probably be known to some of your Lordships; but I cannot find any. Stated thus, it certainly requires a great Deal of Consideration, before it be admitted as Law. Here the Question was, not whether the Sentence shall have Credit in respect of the Understanding, which the Spiritual Judges have in the Rules and Course of their own Law, but whether a Probate, granted of Course, on the Oath of the very Party charged with the Forgery, shall be a full and conclusive Bar to the Prosecution. This is too monstrous to be left upon the Authority of a short and single Case, without condescending to explain what Consistency with Publick Justice, what Respect to Common Sense will allow the Crime of Forgery or Perjury to be defended by the Allegation of that very



Fraud, which the Indictment meant to punish; not stating any Trial, or Judgment upon it, but merely that it had been practised. If the pretended Executor had repelled the Objection of Forgery, even in that Court, it would have borne some Countenance at least; but the Fraud passed without Examination, where, in the Nature of the Proceeding, none could be had.

The other Case, in 1 *Str.* 703, of *the King and Rhodes*, proves nothing, for it was merely a Question of Direction; whether the Court would proceed to try the Forgery of an Instrument, while the Property to be affected by it remained *sub Judice*.

This is a Matter of great Consequence to Publick Justice; at the same Time it is the Sort of Case, which must happen frequently. The Fraud was commonly practised in the late War upon the Sailors; and, if this Rule had existed, could never have been punished: But it was frequently punished; and although, where no Point of Law arose, it is difficult to recover Cases at the *Old Bailey* or on Circuits; yet an accidental Publication of Cases in the *Old Bailey*, without any apparent Selection, has produced Three or Four Instances. One *Stirling* was convicted and hanged for forging a Will; and, so little were either Prosecutor or Court apprised of this Notion of Law, the Probate made Part of the Evidence against him. He had registered it (as it was necessary) in the South Sea House. I am not anxious to state these Cases with more Particularity; because I cannot bring myself to imagine it will be entertained as a serious Opinion, that the mere Perpetration of a Crime may be pleaded in Bar to a Prosecution for it. This is certainly not for the Interest of Justice; nor for the Honor of the Spiritual Court; because it would take away from that Jurisdiction One Guard against Falshood and Fraud, of which every other is possessed.

Thus much concerning the general Proposition, that Sentences in the Ecclesiastical Courts, upon Civil Rights within their Conufance, have conclusive Force upon Publick Prosecutions for Crimes; although it be confessed withal, that the Publick has no Means to intervene, or review those Sentences; and although the Civil Effect of such Sentences is not touched by the Event of such Publick Prosecutions. If this Ground fails, there is an End of the present Motion: But there is another View, in which it has been urged upon your Lordships, which seems to turn out more decisively against it.

Whatever may be said in the Instances of Forgery, Perjury, and other Frauds upon the Spiritual Court, where the Criminal Court may seem to impeach the Foundation of their Sentences, without assuming any Jurisdiction in the Matter of them; in this Case it is impossible to alledge, that the Criminal Court is not fully competent to decide upon the whole Matter of the Indictment; particularly on both the Marriages there stated, as constituting the Crime.

The learned Gentleman, who spoke Second for the Prisoner, informed your Lordships, that this Crime was formerly punished by the Canon Law, and in the Ecclesiastical Court; and insisted, that transferring the Punishment of it from the Ecclesiastical to the Temporal Jurisdiction should not prejudice any Defences, which the Party might have set up in the First Court.

In order to make that Observation bear, some Proof should have been added, that this Sentence would have barred such a Suit, however promoted, *exceptione Rei Judicatae*. Then, supposing this Jurisdiction no better than concurrent, this Court might have been barred, *pari ratione*. But your Lordships have already had the Trouble of hearing it established, but too much at Length, from their Books, that no such Exception would lie in their Law.

The same Thing is no less true in our Law, where the Court can, by any Means, take Conufance of the Right of Marriage. Thus in Dower, where the Common Pleas, by writing to the Bishop, can well try the Lawfulness of the Marriage, a Sentence is no Plea. This was ruled in the Case of *Robins and Crutchley*, 2 *Wilson* 118, 127. The Demandant counted as of the Endowment of *Robins*: The Tenants pleaded, that she was not accoupled to *Robins* in lawful Matrimony. The Demandant replied, that on the 12th February 1754, Sir *William Wolfeley* libelled her as his Wife, in the Bishop's Court of *Litchfield*, for Adultery with *Robins*; that she pleaded a Marriage with *Robins*; that the Cause was removed into the Arches; that *Robins* died; and that afterwards Sentence passed for the Marriage with *Robins*, which then remained in Force. The Tenants demurred; and had Judgment. The Demandant cited many of the Cases your Lordships have now heard, to prove, that a Sentence, by a Court of direct Jurisdiction, ought to conclude another, which has but incidental Conufance of the same Matter. But these were not thought sufficient to avoid another Trial of the same Marriage in a Court, which, by writing to the Bishop, might well decide upon the

Lawfulness



Lawfulness of it. It is clear, that the Sentence would not have concluded in the Trial before the Bishop.

Nay, the very Statute, on which the Indictment is framed, proves the same Thing. It excepts the Cases, where the former Marriage is dissolved, or declared void by Sentence, or was contracted under Age of Consent; all which would otherwise have been triable under an Indictment for Felony.

In order to prove, that any Sentence in the Ecclesiastical Court would bar an Indictment upon the same Matter, the Case of *Boyle and Boyle* was cited. It is reported in 3 *Mod.* 164, and in *Comberbatch* 72. In that Case a Prohibition was awarded to stop the Trial, in the Ecclesiastical Court, of a Marriage there claimed by a Woman, in Answer to a Suit of Jactitation; which Marriage had been found bad on an Indictment for Polygamy, for which the Man was convicted and burnt in the Hand. The Reason assigned, here, for this Judgment was, for fear the Spiritual Court should not take Notice of the Judgment pronounced in the Temporal Court. But this would have been extremely irregular; particularly if by the Course of the Spiritual Court such a Judgment would have been conclusive. Prohibition never goes upon an Apprehension, that the Spiritual Court will do wrong; but where their Rules of Trial are contrary to the Common Law, as in Prescription, or requiring Two Witnesses to a Release; or when they exceed their Jurisdiction, by holding Plea of Temporal Matters as Debts, Freehold, or Temporal Offences. The Reason for granting this Prohibition was, because the Court Christian could not take any Cognisance of a Matter adjudged in the Temporal Court; which thereupon became Temporal. So in the Case of *Webb and Cook, Cro. James, 535, 625*, Prohibition went to the Court Christian at *Norwich*, for entertaining a Libel for Defamation, in saying, that One had a Bastard, who was adjudged the Putative Father: "For that Judgment, being under the Authority of the Statute Law, shall not be impeached in the Spiritual Court, or elsewhere; and all are concluded to say the contrary." Upon the Authority of this Case the same Point was ruled again in *Thornton and Pickering, 3 Keb. 200*. The Ecclesiastical Court has no Cognisance of Crimes. In the Case immediately before that of *Boyle and Boyle*, Prohibition went to stop a Suit there for writing a Libel; because an Indictment will lie for it. In *Serle and Williams, Hob. 288*, this Matter is fully treated. The Ordinary has no Power, even over Clergymen, in a Crime or Offence touching the Crown. Purgation itself was by Permission; and could not be administered, if the Temporal Court delivered *absque purgatione faciendâ*; nor between the Conviction and Sentence; nor before it. In all these Cases Prohibition would lie. And in every other Case, if after Trial of a Felon they prove or disprove any Thing against a Verdict, Prohibition lies. So in *Higgon and Coppinger, Sir William Jones, 320*, Prohibition went to stop a Libel for calling one a Sodomite. "For, as they cannot find the principal Offence, it not being saved to them by the Statute, they shall not hold Plea of the Defamation. And, where any Thing determinable by the Ecclesiastical Court is made Felony, or Treason, and the Power of the Ecclesiastical Court is not saved to it, there they shall not meddle with the Offence; or the Defamation, which arises out of it." The true Reason therefore, why they were prohibited in the principal Case, was, because the Plea depending before them was out of their Cognisance.

Another Case was cited, where Prohibition went to the Consistorial Court of *Exeter*, after Acquittal upon an Indictment for Polygamy: But I have not been able to find it.

More perverse Inferences were never extorted from any Cases, than from these. A Court of Oyer and Terminer is to determine without hearing, for this special Reason, that it will be final. A Court of direct, complete, and exclusive Jurisdiction, is to be bound and governed by One of no Jurisdiction, either direct or indirect, on the Matter. A Court, which decides once for ever, is to be bound by one which never decides. The Sentence remains open for further Examination; let it therefore be adopted without Examination; in order that it may never be examined.

But, to confess the Truth, all which I have hitherto said seems to have been unnecessary. This might have been pertinent Argument, if there had really been a Sentence to combat: But there is none. It has been virtually, if not expressly admitted, that, for the Purpose of deciding upon the present Motion, your Lordships must take it for granted, that the Sentence is collusive and fraudulent in every View, and to every Degree, which Imagination can represent: For your Lordships will not put us, in this Stage of the Business, to take separate Issues upon every Suggestion which may be made for the Prisoner. In Truth her Counsel have argued it so; expressly contending, that a collusive Sentence shall bind the Judgment of the House.

But



But what Kind of Case has been made, or attempted? What Authority has been cited, that a collusive Sentence shall prejudice others, than the Parties to it? In every Book, I have seen, it is treated as a mere Nullity. The only Difference between no Sentence, and a collusive one, is, that in the First Case, you plead *nil tibi record*, generally; in the last, you plead, that it was obtained by Covin; consequently it is waste Paper. If the Court was informed of the Covin, it would commit the Parties for the Contempt, and cancel the Record. This could only be done upon the Idea of the whole Proceeding being a Nullity.

In the 44 *E. 3, 45, b.* In Affize of novel Disseisin, by a Dowress, the Tenant admitted her Title to Dower; but disputed her Affize, because she had been endowed by one, who abated upon his Possession by Covin with her. She argued, that the Abator gained a Fee Simple, whereby he might lawfully endow her; that Recovery of Dower against an Abator is sufficient; and that Endowment *in Pais*, to one who has Right, is equal to Recovery. The Tenant replied, that such Endowment was but Disseisin; therefore his Entry was congeable; and that the Recovery would have been in the same Plight. All the Judges held clearly, that "if one has Action to certain Lands, and by his Assent and Covin the Tenant is ousted, and he, who has the Action, brings it against the Disseisor, he, who is ousted, shall have Affize; and the Possession of him, who recovered, shall be adjudged by Abatement, and not by Recovery; because he was a Disseisor. *Et hoc adjudicabatur coram Knivet.*"

The same Point is laid down in many Books; and in 3 *Co. 78*, it is taken as a general Rule, "That the Common Law so abhors Fraud and Covin, that all Acts, as well judicial as others, and which of themselves are just and lawful, still, being mixed with Fraud and Deceit, are in Judgment of Law tortious and illegal." Nay, it takes away the Privilege of Coverture and Infancy; for the Act is merely void. In the Case in *Coke*, the Fine (a judicial Act) was held for none, by reason of the Covin. So *Farr* and *Chadwick* were both hanged for Burglary, though they entered by an *Habere facias Possessionem*; because it issued upon a fraudulent Judgment. This was thought to heighten the Offence.

The Principle of the Rule applies equally to the Judgments of the Ecclesiastical Court; and so the Rule was applied in *Dyer 339*, where a Revocation of Letters of Administration was held void for Covin. Thus too in *Garvan* and *Roach*, 1 *Ves. 157*. Lord *Hardwick* says of Sentences in the Ecclesiastical Court, that Collusion will overturn the Whole.

It would be idle Affectation to cite all the Cases on this Head, which Indexes would furnish. The Books are full of them from the Annals of *Edward* the Second to the Reports of Sir *James Burrow*. Indeed there never was a Period of Time, in which this Maxim was so continually in the Mouth of the Court, as the last. *Bright* and *Eynon*, and Abundance of Cases more might be cited to prove this. The Court seems to have thought it the principal and most capital Part of its Duty, the *Nobile officium judicis*, to suppress and extinguish every Species of Fraud.

My Lords, The Language of the Civilians and Canonists is exactly the same. *Scaccia*, in his Book *de Sententiâ, Gloss. 14, Quest. 12*, states this Position, *ex vulgatâ regulâ, Rem inter alios actam aliis non nocere*. Upon this he makes many Limitations; upon all of which he adds, amongst others, this Sublimitation; *Quando Sententia esset lata per Collusionem: Fraus enim, et dolus nemini patrocinarî debent, in alterius præjudicium; et ideo Sententia, lata per Collusionem, habetur pro non Sententia; et aliis non nocet; quamvis, sublatâ Collusione, noceret*. The same Thing is laid down by *Covarruvias*, in his Practical Questions, Cap. 15. N. 2. He quotes this Text of the Digest. *Si hæreditatis Judex contra hæredem pronunciaverit non agentem Causam, vel Collusione agentem, nihil hoc nocebit Legatariis*. In *Heraldus de re judicata*, Lib. 1. Cap. 2, N. 1, the same Rule is given upon the same Authority.

Nay, their Courts will receive an Allegation against a Judgment at Common Law, that it was by Covin; and rightly too; for it is a Nullity; and the Authority of the Court, in which Fraud is practised, is never in Question. In *Lloyd* and *Maddox*, *Moor 917*. One sued in the Court Christian for a Legacy. The Executor pleaded Recovery in Debt, which exhausted Assets. The Legatee replied, that the Recovery was by Covin. This Allegation was admitted; and the King's Bench refused to award Prohibition. Here both Courts agreed, that to alledge a fraudulent Judgment was to alledge nothing; and the inferior Jurisdiction was expressly permitted to try this Sort of Nullity in the Judgment of the superior.

There is a great Abundance of Cases more, which I shall have Occasion to cite to your Lordships, if the actual Fraud of the present Sentence should ever be disputed; Cases, in which much weaker Grounds of Imputation, than those which occur here, have been thought sufficient to avoid a Judgment.

But,



But, my Lords, what Arguments have been used on the other Side upon this Part of the Case?

First, It has been insinuated, that certain Statutes, made against Covin, account for the many Judgments to be found in our Books; and prove, that, without such Statutes, they could not have obtained. But many of the Cases were before the Statutes referred to. The Principle, avowed by the Judges, is independent of them. They all provide either additional Sanctions against Fraud; or new Precautions against the Opportunity of practising it. And it would be a very mischievous Construction, if a Statute against a particular Fraud were to protect every other.

Secondly, the fraudulent Sentence must be sent back to the Court, where the Fraud was practised, in order to be corrected. Why so? If the Thing alledged against a Sentence were Error, mis-judging either the Law or the Fact, it must be reversed in the same Jurisdiction, original, or appellate. But the Court, in which the Sentence is pleaded, must determine on the Reality and Application of that Plea, just as it would on any other Matter pleaded. Fraud is a Fact. The Conclusion is, that it puts a total End to the Cause. The Court, in which such Cause depends, must be as competent and perfect a Judge of that Fact, as the Court, in which the Fraud was perpetrated. I say as competent and perfect; because the Court, where the Fraud has been practised, which has overlooked such Circumstances as appear on the very Face of these Proceedings, does not seem to me the very Place to which one would send a Question of Collusion to be tried. All the Authorities referred to before, and the numerous Instances of replying Fraud to Pleas of Judgments by other Courts, on which it was practised, contradict this Notion. But Cases are cited on the other Side. *Kenne's Case*, it was said, proves, upon the State of it, that the Sentence was fraudulent. The Bill in the Court of Wards stated, that the Sentence was false, and with a deal of Aggravation. But who ever referred to an *English* Bill for the true State of any Case? The Question, referred to the Judges, says nothing of the Collusion. The Case of *Morris and Webber*, in *Moor* 225, was also cited to prove, that Collusion apparent in an Ecclesiastical Sentence did not hinder it from concluding in a Court of Common Law. A Man, divorced *propter impotentiam*, married another Woman, and had Children. The last Circumstance, it was said, disproved the Cause of the Divorce; and therefore the Judgment was apparently collusive. But that Circumstance did not even prove the Judgment false: For one may be *habilis quoad hanc*. The Law presumes the Children of a Marriage legitimate: But that does not prove the Fact of Generation to any other Purpose. If the Ground of the Sentence was false, it would not follow that it was collusive. Collusion was not even alledged in the Case; and consequently makes no Part of the Judgment. In the same Manner they referred to the Appellant's printed Case, in this House, in *Hatfield and Hatfield*, for an Averment, that the Sentence was fraudulent. But there, as it happens, the State of the Case disproves the Collusion: For *Porter*, the Defendant in the Ecclesiastical Court, was in the Appellant's Power. They cited also the Case of *Prudham and Phillips*, from a most inaccurate Note in the Margin of *Strange*, 961; who certainly knew nothing of the Case he referred to. The Case in Truth was this, *Prudham* brought *Assumpsit* against *Constantia Phillips*. She gave Evidence of her Marriage with *Muilman*. *Prudham* produced a Sentence of the Ecclesiastical Court, annulling that Marriage, because she was already married to *Delafield*, who was then alive. She said, that Sentence was fraudulent. But the Court, admitting that the Objection would have been good in the Mouth of a Stranger, would not suffer her to alledge Fraud in herself, for her own Avail. The learned Doctors also cited a Case of a Lady *Mayo*, and a Mr. *Brown*, in the Prerogative Court. There, a Sentence in a Matrimonial Cause being pleaded, the adverse Party alledged, that it had been obtained by Collusion. One learned Gentleman said the Allegation was *repelled*; the other that it was *not admitted*. I am informed the last is nearest to accurate; for nothing was done in that Matter. The Cause is still depending. The First Argument promised all that Length of Erudition, which your Lordships were favoured with Yesterday: In View to which the Judge asked, whether they had not better agitate the Question of Fraud, where it was committed; an Issue, more natural for the Judge to wish, than proper for the Court to award. The most loose and unconsidered Notion, escaping in any Manner from that able and excellent Judge, should be received with Respect; and certainly will. But it is unfair to him to call this his Judgment. If the Question were my own, with the Choice of my Court, I should refer it to his Decision.

Thirdly, among other Reasons against holding Plea of the Collusion before your Lordships, they insisted, that it was not worth while; their Sentences are so open to repeal at the Suit of any-Body, that whoever finds them objected, has nothing to complain of, but his own Remissness. Their Proceedings are so frivolous and ineffectual, their Judgments so

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inconclusive and harmless, that Nullity, however established, makes no material Difference in them.

Such were their particular Arguments. In a more general Way, they pressed upon your Lordships, with much Earnestness, the Consideration of the unhappy Case, to which they said we would drive the Prisoner. The Sentence has deprived her of all conjugal Claims upon Mr. *Hervey*; and we acknowledge it to be conclusive upon her, while we insist that it is merely void against all the Rest of the World. She is, therefore, according to us, a Wife, only for the Purpose of being punished as a Felon. This strange Apology was not insinuated, in Mitigation of the Punishment, or to the Compassion of your Lordships; but directly and confidently addressed to your Justice. Do not proceed to try the Crime, because the Purpose of committing it is totally frustrated; and many other Inconveniencies have ensued. In other Words, the Crime has been detected. These Disappointments, these inconvenient Consequences of Guilt are the Bars, which God, and the Order of Nature, have set against it: But they have not been found sufficient. It demands the Interposition of publick Authority, with severer Checks, to restrain it. Why is she thus hampered with the Sentence she fabricated? Because she fabricated it: Because Justice will not permit her to alledge her own Fraud, for her own Behoof; nor hear her complain of a Wrong done by herself.

In short, my Lords, the Motion is wholly inadmissible. It is inconsistent with all Order and Method of Trial, for us to debate imaginary Topics of Defence, before hearing the Charge; and for the Court to resolve abstract Questions, upon hypothetical Grounds; is a Sentence pronounced between Two certain Persons admissible Evidence against others? Is this Species of Sentence so? Is either admissible against the King—in any publick Prosecution—in this particular Sort of Prosecution? Is such Evidence probable only, or conclusive—against the Parties to it—against Strangers—against the King—and in what Cases? What, if it were obtained by Collusion? What, if by her Collusion? Will it serve her? May she offer it safely? How much will it prove against her? What Evidence will do to prove the Collusion?—There is no End of such Questions. At the same Time I was not solicitous to prevent any Part of the Argument. Were it possible for your Lordships to stop this Prosecution here, I have no Desire to wound the Mind of any Person, unnecessarily, or, if so painful a Duty may be dispensed with. But I have rather wondered to hear such Hopes as these thus far encouraged;—or even entertained on the Part of the Prisoner with Confidence enough to make it worth her while to avow, in this Stage of the Business, that she had rather have every Thing presumed against her, than hear any Thing proved; and to disclose to your Lordships, not an Anxiety to clear her injured Innocence, but a Dread of the Enquiry; a Wish to submit, in Silence, to the Charge. Was this her Solicitude to bring the Question here? Of what Avail would it be to any Body, in any Condition, to appear in any Court, and defend thus? But, in such a Court, before so venerable an Audience, to hear nothing pleaded against a Charge of Infamy, but a frivolous Objection to entering upon the Enquiry:—Unless Topics stronger, more pertinent, and pointed could have been urged, I am exceedingly sorry, upon every Account, that the Time of your Lordships has been thus taken up; and that we did not go directly into the Examination of the Matter before you.

*Mr. Solicitor General.*

My Lords,

There are two Questions at present before your Lordships; the one turns upon the Effect of a Sentence obtained from the Ecclesiastical Court in a Case of Jactitation of Marriage, which the Counsel for the Prisoner have maintained to be a conclusive Bar to the Inquiry now instituted in a Court of Criminal Justice: The other is, whether that Argument ought to be admitted in this Period of the Proceeding.

My Duty requires me in the First Place to submit to your Lordships some Objections to admitting that Sentence in Anticipation of the Charge, after a Plea of *Not Guilty* to the Indictment.

The Plea, which is the Defence upon the Record, denies the Charge; but the Argument contends, that the Charge ought neither to be stated, nor proved. To proceed first to consider the Merits of a Defence without a Charge established either by Proof or Admission



of the Party, is at least a very great Novelty in a Criminal Proceeding, and a very wide Deviation from the ancient Course of Trials; and it is a Presumption of some Weight, that a Mode of Trial, which has prevailed for Ages, is not founded in Folly nor Injustice.

In the regular and ordinary Course, a Prisoner who has any special Matter to alledge, which ought to bar the Enquiry into the Crime, must state it in the Form of a Plea of the Indictment. Upon the Plea of the Party every Court of Criminal Jurisdiction must form a judicial Determination: A Pardon, a former Acquittal for the same Charge, are Defences which preclude an Inquiry into the Crime; but the Party can only insist upon such Defences by pleading them, the Court can only take Cognizance of them when pleaded.

The present Proceeding would oblige the Court to try the Validity of the Charge, by first hearing the Defence; in the Course of that Hearing not only the State of the Charge is supposed, but a Reply to the Defence by new Facts is also taken by Supposition; and, should such a Method be permitted, your Lordships would be placed in a Situation very different from the Exercise of judicial Authority; for Courts of Justice are not instituted to decide a Disputation upon a Thesis of Law; their Province is to decide upon real Fact, not upon general or hypothetical Propositions; nor can they pronounce the Law, till the Facts, from whence that Law arises, are first established.

The Counsel for the Prisoner are obliged to state their Argument thus: Suppose, say they, the First Marriage to have been solemnized, but a Suit to have been instituted to impeach that Marriage, in that Suit a Sentence pronounced against the Marriage; suppose that Suit and Sentence to have been fraudulent, yet even such a Sentence ought to be conclusive, and to bar all Inquiry into the Crime of a Second Marriage. The only Answer, which I submit to your Lordships such an Argument at present demands, is, that a Court of Justice cannot suppose the Fact of the Marriage, nor the Suit to impeach the Legality of it; no Supposition can be formed, whether the Proceeding in that Suit was fraudulent, or was fair, the Sentence real, or colourable; the Parties must agree upon the Facts before the Court can be asked to decide the Law; if they do not admit the Facts upon Record, it remains for both Parties to prove what they think material; then, and not till then, it is the Duty of the Court to pronounce the Law.

No Precedent has been quoted to shew, that a similar Proceeding was ever admitted in a Court of Criminal Jurisdiction. One Case only was faintly alluded to by the learned Gentleman, who spoke First Yesterday. The Case of *Jones and Bow*, cited from *Cartbew*; where the Reporter says, that, “by way of Anticipation to the Evidence that the Plaintiff was about to give, the Defendant produced a Sentence of the Ecclesiastical Court in a Cause of Jactitation, a Debate arose upon the Effect of that Sentence, and the Court being of Opinion that the Sentence was conclusive, the Cause between the Parties ended.”

That Cause was an Action of Ejectment to try the Title to an Estate. A Proceeding by Ejectment is well known to be entirely fictitious. In a Suit founded upon a legal Fiction to try a Question of Right, where the Judgment is not conclusive on either Party, there may be no Mischief in pressing forward to the Conclusion without an exact Attention to Forms. The Case therefore does not prove, that in a Civil Action, where Judgment is given upon the mere Right, such Proceeding could have been allowed: But a Criminal Proceeding requires still more Precision than a Civil Suit, and a Deviation from the Forms would very seldom be favourable to the Accused. If the Prisoner is not confined to the Defence pleaded, neither would the Prosecutor be confined to the Matter of the Charge; the Judge and the Jury would mutually encroach upon each other; nor could there be a more dangerous Source of Error and Confusion, than to permit a mixed Consideration of Law and of Fact, of Hypothesis and of Argument, to be introduced into Criminal Trials. The only Plea to the present Indictment is *Not Guilty*. The Argument your Lordships have heard, supposes, that such a Plea ought not to have been put in; that there is a more prudent and cautious Method of Defence, which you are desired to hear upon Suppositions, without the Form or Substance of a Plea.

The Counsel for the Prosecution are bound to oppose this Experiment. It would ill become them, acting in the Character of a publick Accuser, to advance any Doctrine which they did not believe to be founded in Law, or to suppress an Objection to a Proceeding which, as it is novel, cannot pass into a Precedent without great Danger and Mischief. Should that Objection prove, that the Argument, which in this Stage of the Business the Counsel in Defence have been permitted to urge, is inadmissible, your Lordships will however have no Reason to regret the Delay it has occasioned, nor to deem that Time mispent, which has



has been employed in the present Inquiry, since the Object of it, though fruitless, has been directed to the Relief of a Party accused. Supposing then the Debate upon the Effect of the Sentence urged in Bar of the Trial to be proper at this Time, I shall proceed to the Consideration of the Argument.—The Proposition advanced is this; that in an Indictment upon the Statute of *James I.* for marrying a Second Husband, living the First, a Sentence of an Ecclesiastical Court, in a Cause of Jactitation of Marriage, pronouncing, that it does not as yet appear to that Court that there hath been a First Marriage, is a conclusive Evidence that no such Marriage ever was had.

In order to make out this Proposition; the Counsel contend, First, That it is an universal Rule, that the Decrees of Courts, having competent Jurisdiction, bind all Persons, and conclude in all Cases, in any Manner touching the Matter decided. Secondly, they maintain, that the Sentence of the Ecclesiastical Court in Question is a Decision. They urge in the Third Place, that the Rule first laid down admits of no Exceptions, but applies with more Force to Criminal, than to Civil Cases. In the last Place they insist, that supposing this Sentence to be the Effect of Fraud, Collusion, and Agreement between the Parties to the supposed Suit in the Spiritual Court, it is notwithstanding conclusive upon all other Courts, and the Fraud can only be examined in that Court whose Justice has been thus ensnared.

My Lords, I have stated fairly the Argument on the other Side, which rests on these Four Propositions, and, were I only engaged in a Disputation with the learned Gentlemen upon a mere Thesis in Law, I should be inclined by a Denial to insist upon better Proofs, than have been offered in Support of these Propositions. I feel myself however under a very different Impression of Duty as one of the Counsel for the Prosecution. The Prisoner may take every Advantage, that the Law will allow; from us your Lordships have a Right to expect every Concession, that Justice requires. I shall therefore admit (as far as in my Conscience I think them admissible) the several Propositions urged by the opposite Side, state with as much Fidelity as I can the true Limitations of the Doctrines advanced, and assert no Point but what I hold to be clear Law, supported by undoubted Authority.

It is contended, in the First Place, to be a universal Rule, that Sentences of Courts of competent Jurisdiction are binding upon all other Judicatures, in which any Inquiry arises into the Matter determined: That Proposition I conceive to be much too largely stated. The Rules and Principles that I have learnt upon that Subject, I will very briefly submit to your Lordships, not meaning to argue, but only to state them.

It is a general Maxim of Law, that the Sentence of a competent Court binds the Parties, and all Persons deriving any Right under them; as to Third Persons, it neither prejudices nor benefits them.

Another Maxim, equally true, is, that a Sentence of a Court having competent Jurisdiction, if it comes collaterally before another Court in another Suit, shall be presumed just till the contrary appears. One Court has no Authority to direct the Judgment of another; but it is a fair Presumption, that what hath been decided, hath been justly decided; it is however but a Presumption, and in most Cases it obtains only till the contrary is proved.

I admit at the same Time, that there are Cases, in which that Presumption may amount to a Conclusion. Where the Sentence has been pronounced *in Rem*, by a Judicature having a peculiar and exclusive Jurisdiction over the Subject Matter of the Cause; the Effect of such a Decision is not to be controverted in any other Civil Suit. These Propositions are founded in the Consent of all Lawyers, who have treated of general Law, and are proved by a Series of judicial Authorities; to quote them would lead into an unnecessary Detail upon a Part of the Argument, which does not immediately apply to the Decision of the Point in Question.

The Cases cited on the other Side agree with the Distinction I have mentioned. A Sentence of a Court of Admiralty upon the Forfeiture of a Ship; the Judgment of the Court of Exchequer condemning Goods as forfeited; are each of them conclusive upon this Principle, that the Sentence is *in Rem*, the Court has pronounced upon the Property itself. The Cases quoted of Sentences of an Ecclesiastical Court, are all in Matters of which that Court has the peculiar and exclusive Cognizance. The Ecclesiastical Court has the sole Jurisdiction of Cases testamentary, and of Cases matrimonial, to a certain Effect; if therefore a Question arises, who is intitled to the personal Estate of a Man deceased with or without a Testament, the Probate of the Will, or a Grant of Administration, gives the Title to the Property in Question; the Effect of it cannot be contested in other Courts collaterally and incidentally, because no other Court has Power to controvert the Act, no other Authority can confer the Title to the Thing in Dispute. Such Sentences are *in Rem*.



The Case is very different, where the Decision is upon a personal Contract, or any Matter arising out of the various Civil Relations of Persons, in which the original Cognizance of the Cause might have come before the Court; where that Decision is offered as an Evidence of Right, there the Judgment of the foreign Court can only have Effect so far as it is just; no Authority belongs to it but from its internal Justice; for the Court, in which it is produced, owes no Obedience to the Court which pronounced it, and is equally competent to give the Law to the Parties. The Effect of the Sentence is beneficial however for the Party who has obtained it; because the Justice of it is presumed, the Truth of the Facts on which it proceeded is admitted without Proof, and the adverse Party is obliged to demonstrate the Falshood or Iniquity of it.

In Support of this Distinction I will only mention to your Lordships one Authority of a late Date, which I select from a Multitude of Cases, not merely because it is a Determination in the last Resort, but because the Rule of Law is stated in the Judgment: The Case I allude to was decided by your Lordships on the 4th of *March* 1771, upon Appeal from the Court of Session in *Scotland*, by *Sinclair* against *Frazer*; the Question there was, What should be the Effect of a Judgment obtained by the Appellants in *Jamaica*? The Person, against whom that Judgment was directed, was sued upon it in *Scotland*; it happened, that the Court of Session refused to give any Effect to it, and held the Party bound to prove the Ground, the Nature, the Extent of his Demand: From that Determination an Appeal was taken to your Lordships, the Judgment of the Court of Session was reversed, and the Words of the Order of Reversal were, "That the Judgment complained of be reversed," and declare "That the Judgment of the Court of *Jamaica* ought to be received as Evidence *prima facie* of the Debt, and that it lies on the Defendant to impeach the Justice of it, or to shew that it was irregularly and unduly obtained."

My Lords, The Authority that I quote to your Lordships will have considerable Effect in a subsequent Part of the Argument: At present I only urge it as a Proof, that though in Cases, where the Sentence is *in Rem*, where the Court has a peculiar and exclusive Jurisdiction to determine the Title to the Thing in Question, the Presumption in Favour of the Judgment is admitted to be conclusive; yet where the Judgment is applied to personal Rights, to Matters of which other Courts have equal Cognizance, the Party against whom it is urged is at Liberty to impeach it, to shew that it is not just, or that it has been irregularly and unduly obtained.

This being the Distinction in Civil Cases, the Question arises, how far these Rules are applicable to Criminal Suits? What Effect ought the Sentence of any Civil Court to have as a Bar to the Justice of the State in the Trial and Punishment of Crimes?

The Counsel for the Prisoner argue, That if the Civil Right is destroyed by the Sentence of a competent Court, to examine into the Crime is an absurd Inquiry; where there is no Relation, there is no Duty, and there can be no Breach of it. Is this so? Is it then competent to a Party by any Act, destructive of the Civil Relation, to abolish the Duties of that Relation? Persons may deprive themselves of the Benefit of any Civil Right, may dispense with the Advantages of any Relation of Life, may be intitled to claim neither as Wife, Mother, nor Child: But can they absolve themselves from the Duties, that belong to the natural Relation? Can they, by their own Act, absolve themselves from the sacred Duties of those Civil Relations, which, in a State of Society, are natural Relations?

My Lords, The Proposition I contend for is so far from absurd, that the contrary of that Proposition would involve in it the most manifest Absurdity: The Civil Interest is important only to the Parties themselves. Whether an Estate belongs to one Person or another, whether a Party is intitled to Rank and Distinction, to whom related, whose Wife she is? The Question is of great Indifference to Society; but if the Estate, the Relation, the Rank, is obtained by Criminal Means; if the Situation which a Person chuses to relinquish is attended with Duties, the Advantage, but not the Duties, may be waved; the Peace and Order of Society must be maintained, and no Violation of them can pass with Impunity.

If there is an universal Proposition of Law, I take this to be so, That no Determination between Party and Party can preclude Publick Justice from inquiring into the Criminal Tendency of their Actions; daily Experience proves this in the most trivial Instances: An Action is brought for an Assault, the Party fails in it, there is a Verdict against him; it does not prevent a Prosecution by Indictment, upon the very same Fact, against the very same Party: In such an Indictment was it ever pleaded, that an Action had been brought against the Party for that alledged Trespass and Beating, and that he had been acquitted upon that Action? The learned and reverend Judges will inform your Lordships, that there is not a

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Sitting or an Assize without some Instance of this Sort. A Question may arise in an Action upon Property, to which of Two Persons a Thing, an Horse for Example, belongs; it is decided to belong to *A.* and not to *B.* would that Decision bar an Indictment against *A.* for stealing the Horse? It is no Answer to publick Justice, that he has acquired that Property, when the Object of the Criminal Inquiry is, whether he has committed a Crime in acquiring it.

The Proposition advanced on the other Side, that a Sentence in a Civil Suit is conclusive in a Criminal Proceeding, was not so much pressed upon any Deduction of Argument, as asserted on the Authority of a Case cited from *Strange's Reports*; in which it was said to have been determined, that the Grant of the Probate of a Will by the Ecclesiastical Court was a Bar to an Indictment for Felony in forging that Will.

In the First Place your Lordships will give me Leave to ask, does it enter into the Imagination of any Lawyer, that the same Rule would take Place with Regard to a Will of real Estate? Had such a Will been produced in Judgment, the Witnesses to it examined, the Validity of it canvassed, a Judgment in Favour of it, even a Decree of the Court of Chancery establishing it, I do presume it will not be maintained, that all those Proceedings would prevent a Prosecution for the Forgery of that Will. The same Thing might happen in the Case of a Deed; a Deed may have been established by a Decree; the Property of an Estate settled by it, irretrievably perhaps; would there be no Punishment for the Crime, if it should be discovered afterwards, that that Deed was a manifest Forgery? The Estate might be held indefeasibly by the Party who had obtained it; but I do not conceive that his having got Possession of that Estate, having obtained an Advantage of which human Laws could not deprive him, would be an Answer to human Justice why he should not be punished for the Crime, by which he had gained that Advantage.

It is supposed however, that there has been a Decision, that a Probate of a Will of personal Estate bars an Indictment for forging that Will. Is the Grant of a Probate then an Act of so high a Nature, requiring so much judicial Accuracy, that it is not to be questioned? A Probate in common Form is not even a judicial Act, it is merely official; there is no Litigation, no Inquiry; the Conscience of the Judge is not engaged in it. What is the Purpose of forging a Will of personal Estate? To obtain a Probate; for without it there might be a Criminal Intention, but no Prejudice could arise to any Person from that Intention; shall it be said then, that the Accomplishment of the Crime is to afford Protection for itself? The Authority relied on is a Note in *Sir John Strange's Reports*, under the Name of *The King and Vincent*, that a Person being indicted for forging of a Will, upon producing a Probate; a Probate in the common Form was held a Bar to the Proof of the Forgery, and he was by the Judge acquitted. This is the whole Note: It is a great Misfortune that Notes, very often taken upon loose Information, are given to the World under respectable Names. The Collections of a Lawyer, made only for his own Use, must abound with Errors; in publishing such Collections many of these will escape; and this is not the only Instance of Mistake in that Collection. I conceive it to be impossible at any Period, at any Time of the Day, by the Negligence of any Judge who might happen to be present at the *Old Bailey*, that a Prisoner could have been acquitted of a Charge of Forgery upon such a Defence. I say this with Confidence; because, in the Inquiry that hath been made into the Cases determined, many have been found, where Parties have been tried and convicted for forging a Will of personal Estate, and the Evidence to prove the Publication of the forged Will has been the Probate, produced by the Officer of the Court, and his Testimony that the Prisoner was the Person who obtained the Probate.

Mr. Attorney General quoted to your Lordships the Case of *The King and Murphy*. The Prisoner there had the double Villainy to turn the Charge upon his Prosecutor; the Trial was attended by Counsel who do not usually go to the *Old Bailey*; it is stated very fully by a Short-hand Writer at the End of the State Trials. The Case of *The King and Sterling* was also mentioned; it is very manifest that that unfortunate Person was unjustly hanged, if the Case in *Strange is Law*. *Sterling's* Case was this; he was indicted for having forged a Will, of which Will he had obtained a Probate, and under that Title had transferred some Stock; the Person whose Will he said it was, was alive, and produced as the Witness against him, and of course to impeach the Probate of her own Will: Absurd as it may seem to doubt whether that Evidence was competent, if the Case of *The King and Vincent* was Law, undoubtedly that Witness ought not to have been permitted to prove her own Existence; she was dead by irrefragable legal Argument; but the Event was different, and Mr. *Sterling*, notwithstanding the Probate, suffered for his Crime.



Besides these Cases, there was another in no very remote Period, in which a Party was tried for the Forgery of a Will, in *September Sessions 1765*, at the *Old Bailey*. One *Richardson* and one *Carr* were indicted for having forged a Receipt for the Payment of Money, with Intent to defraud a particular Person, who was a Seaman, intitled to Wages; the common Cases of Forgery of Wills have been in the Case of Seamen. Upon the Trial it appeared that the Receipt was given in the Name of *Jane Steward*, who was the supposed Executrix of a Will of this Seaman, which had been proved by the Defendant *Carr*, upon the Oath of the other Defendant *Richardson*: The learned Judge, Mr. Baron *Perrot*, who tried them, was of Opinion that the Prisoners ought to be acquitted of the Charge of forging a Receipt for the Money; but, being satisfied from the Evidence, that *Richardson* had forged the Will, notwithstanding it had appeared in the Trial before him, that a Probate had been granted of that Will, he remanded *Richardson* to Gaol to take his Trial for the Forgery of the Will. *Richardson* was accordingly tried in *October Sessions 1765*, for forging the Will of *John Steward*, a Mariner: The Officer of the Prerogative Court proved upon that Trial, that the Will was brought to his Office by *Richardson*, and a Probate of that Will granted; and upon that Proof he was convicted, and executed. The First learned Judge had remanded him to Prison to take his Trial at the ensuing Sessions for the Forgery of a Will, the Probate of which was then in Court; and upon the Second Indictment, which was tried by the noble Lord who presides in the Court of King's Bench, the Prisoner was convicted notwithstanding the Will had been proved. Other Cases have been mentioned to your Lordships to the same Effect with these, which sufficiently refute that singular Case of *The King and Vincent*, the only Authority to support the Argument, that the Sentence of an Ecclesiastical Court is a Bar to an Indictment.

Having thus removed the only Obstacle to the Proposition I meant to rely upon, that in a Criminal Matter a Sentence of a Civil Court ought not to be conclusive against a publick Accusation, I now proceed to a more limited and close Enquiry, what Effect the Sentence of Jactitation ought to have in this Proceeding, an Indictment for Bigamy?

It is of no Importance to the present Enquiry to investigate, by what Means the Cognizance of Causes matrimonial and testamentary belongs not to the Sovereign of the State, but is given to an Order of Men, dedicated to the Service of Religion. The Fact is, that in the Jurisprudence of this Country, Causes matrimonial and testamentary are of Ecclesiastical Cognizance. The Right to try them is not derived from the King as the Fountain of Justice, nor exercised by the King's Court; but wherever the royal Authority interposes, it is not as Sovereign of the State, but as supreme Head of the Church. The Law did not even interfere to punish the Violation of the matrimonial Rights, and Adultery, which in most Countries of *Europe* is treated as a Crime, but was not considered in *England* as an Offence punishable by the Magistrate, but left to the Correction of Ecclesiastical Censure. At length however the Violation of conjugal Duty, accompanied with the Circumstance of an open Attack upon the Order of Society, by a Second Marriage, was, by special Statute, made a Crime: When I say made a Crime, I do not mean it was made more immoral; but it was made a Subject of Criminal Cognizance by the Magistrate. The learned Counsel, who spoke Second Yesterday contended, that this Statute gave no Jurisdiction to the Temporal Courts to pronounce upon the Legality of the Marriage; but that the Jurisdiction of the Ecclesiastical Court, as to the Trial of the Marriage, remained still absolute. It was necessary for his Cause to attempt this Argument; but to maintain this Proposition is, a very difficult Task. The Legislature, Fifty Years after the Reformation, has declared that the Crime of Bigamy shall be punishable as a Felony by the Magistrate. To convict a Person of that Crime, must not the Magistrate try him? Has he not the Power to acquit or condemn him? Has he only an Authority to inflict the Punishment, as in old Times, when the Church delivered over the Offender to the secular Arm? and is the Sentence of the Spiritual Court to guide the Conscience of the Judge and Jury in the Criminal Court? The Sentence of the Ecclesiastical Court in the present Case is said to be against the First Marriage, and therefore it is urged the Prisoner ought to be protected by it; but, if the Argument is just, it must hold equally, where the Sentence is for the Marriage; it sounds less harsh to contend that a Party, declared not to be married in the First Instance by the Spiritual Court, shall not be questioned for the Second Marriage. But by the same Rule we must conclude, that if the Spiritual Court had determined for the Marriage in the First Instance, and the Fact of a Second Marriage had been proved, it would not have been competent for the Prisoner in an Indictment for Bigamy, so circumstanced, to have made any Defence; he is concluded by the Sentence, the Judge and Jury are bound to believe it, and, upon that Sentence, without Examination, to convict and to punish.



The Effect of the Statute I take to be very different ; it has created a new Offence, and for the Trial of that Offence the Cognizance of the Lawfulness of Marriage is given to the Temporal Courts. As to all Criminal Consequences that Court has Cognizance to determine as well as the Ecclesiastical Court, what is and what is not a legal Marriage between the Parties. That it has so the Case of *Boyle and Boyle*, quoted to your Lordships for another Purpose, is a clear Proof: That was a Prohibition issued to the Ecclesiastical Court to enter into an Examination into that Cause of Marriage, which the Court, in trying the Indictment, had determined. The other Case mentioned by the learned Doctor is to the same Effect. The Two Cases differ only in this, that in one the Party was convicted, in the other acquitted ; but the Court was of Opinion in both, that the Ecclesiastical Court could not interfere.

It is unnecessary however to have Recourse to Authorities, for the Statute itself has decided this Question. The Legislature seems to have had it in View, that a Jurisdiction being newly given to the Temporal Courts in the Trial of Marriage, Questions might arise, as between concurrent Jurisdictions, what should be the Effect of Sentences pronounced by the Ecclesiastical Court. It was a wise Foresight in those who compiled the Statute, to define in what Cases the Sentences of the Ecclesiastical Courts ought to preclude any Enquiry for the Crime ; and it is defined in the Words of the Exception, “ That this Act shall not extend to any Persons divorced by the Sentence of the Ecclesiastical Court, nor to any Persons where the former Marriage has been by the Ecclesiastical Court declared void and null.” There are Two Cases then put by the Statute, in which the Sentence of the Ecclesiastical Court protects the Party against a Criminal Inquiry ; Sentence of Divorce, and Sentence of Nullity of Marriage : If therefore the Ecclesiastical Court, having competent Jurisdiction, has either divorced the Parties, or if it has pronounced Sentence of Nullity of Marriage, the Sentence in these Two Instances is conclusive : But the Statute has no Exception in Favour of a Sentence in a Cause of Jactitation. There is no Pretence to argue, that a Sentence in a Cause of Jactitation is either a Sentence of Divorce, or that Sentence which makes the Marriage void and of no Effect : No Lawyer, no Civilian can make that Mistake. What then does the Exception prove? Two Sentences of the Ecclesiastical Court are recited in it, the Third is omitted ; and it is a general Rule of Law, that wherever a Statute excepts particular Cases, the Exception of those Cases extends the Statute to all Cases not excepted. That Proposition is too clear to require Authorities to be cited in Support of it. The Law therefore, which says the Trial of Polygamy shall proceed in all Cases, except where a Sentence of Divorce, and except where a Sentence of Nullity of Marriage has intervened, does virtually say, that a Sentence in a Cause of Jactitation of Marriage, which is neither of Divorce nor of Nullity, shall not bar the Trial. I conceive therefore the Statute to have decided this Question.

The Argument on the other Side is put in a more plausible Form by stating the Defence to be founded upon a Fact, of which the Sentence of the Ecclesiastical Court is the best Evidence : There can be no double Marriage, it is said, because the Sentence disproves the First Marriage. This Mode of stating the Argument makes it necessary to examine the Nature of a Suit for Jactitation of Marriage, in order to see what Credit is due to the Sentence, when offered as Evidence to disprove the First Marriage.

A Suit for Jactitation of Marriage is, from Beginning to End, totally singular. Some Writers on the Canon Law derive its Origin from the Doctrine of Pre-contracts, which, by the Ecclesiastical Law, constituted a Marriage : And till that very mischievous Prejudice was destroyed by the late Marriage Act, it is not surprizing that any Attempt to lessen the Evil should meet with Encouragement. The Form of the Suit is this : The supposed Husband or Wife complains to the Ecclesiastical Judge, that he or she is a Person free from all Matrimonial Contracts or Engagements with the adverse Party, and so esteemed by all Neighbours, Friends, and Acquaintance ; that the adverse Party, notwithstanding the Knowledge of this, has falsely and maliciously boasted of a Marriage with the Party complaining ; it concludes then by such false Assertions an Injury is committed, and prays that Right may be done by declaring the Party free from all Matrimonial Engagements with the other, and by enjoining that Party perpetual Silence. The Party Defendant may either say, I have not boasted, I deny that Fact ; or, if he admits that he has boasted, he is then to go on and alledge circumstantially a Marriage, which the other Party denies, under the Circumstances alledged. If the Marriage is not proved, then the Court pronounces, That, so far as yet appears, the Party complaining is free from Matrimonial Contract with the other Party, and enjoins perpetual Silence,

After



After this Sentence, so gravely pronounced, your Lordships are told by all the learned Doctors, and all the Books of Practice agree, that this Injunction of perpetual Silence continues no longer, than till the Party chuses to talk again; and the Person, to whom he may with the most perfect Safety repeat his Assertions, is the Judge who enjoined him Silence; for, it is agreed on all Hands, that the Party may at any Time inform the Court, that though it did not appear formerly that he was married, he can make it appear now; and such Proof is admissible.

The Forms of all Courts had probably a good Original, and this Suit may have been introduced to prevent a greater Mischief; but it is impossible to avoid Collusion in such a Proceeding, which has no avowed Object, but to correct the Indiscretion of a supposed Discourse; and which, as the learned Doctors on the other Side truly state, has no Termination; and between the Parties themselves never obtains the best Effect of a Judgment, to put an End to Litigation. In modern Times such Suits have seldom been commenced but to favour some indirect Purpose; and were the Sentences allowed to have the Effect that is now contended for, were they to be a Bar to all Criminal Enquiry, it might be expected that Suits, which, as the learned Doctors state, may be carried on without End, would very frequently spring up.

Nothing can be further from the Temper of my Mind upon the present Occasion, than to use a ludicrous Argument; but when the uncontrollable Effect of such Sentences as these, so contrived and framed for Fraud, was urged Yesterday; and while, to lessen the Objection to them, it was gravely argued, that no great Mischief could happen from the Decision, because you may reverse this Sentence To-morrow, that the next Day, and a Third after that, and that the Suit was in its Nature eternal; an ingenious Person among the By-standers was calculating, how many Wives, a Man that had a Taste for Polygamy, might marry with Impunity: And I think he made it out, according to the probable Duration of such a Suit, that a Man between Twenty-one and Thirty-five might, with good Industry, marry Seventy-five Wives by Sentences of the Ecclesiastical Court, each Sentence standing good till reversed, and all reversible by that Judicature.

My Lords, The Argument is serious, though it presents a ludicrous Idea; for One Consequence would probably attend a Decision in Support of the Authority of such a Sentence. The Marriage Act put an End to that terrible Disgrace of a civilized Country, *Fleet* Marriages: While they subsisted, it was a common Practice for indigent Women of easy Virtue to get a *Fleet* Husband to protect them from their Debts. If a Sentence of the Ecclesiastical Court is to have Effect against all but the Parties, a Cause of Jactitation will supply the Place of a *Fleet* Marriage, and furnish an Husband by Sentence, whom the Lady may remove whenever he proves inconvenient. This is but One Instance, and in the lowest Class of the Evils, that would follow from allowing such Sentences to be interposed against publick Justice, or the Rights of Third Persons. What Guard can there be against uncertain Issue, uncertain Rank, and all the numerous Mischiefs, that arise from Doubt and Collusion, introduced in the Relations, that form the Bonds of Society?

Were all Considerations of the Consequences attending such a Decision to be laid aside, the very Form of the Sentence argues against its being conclusive. What says the Ecclesiastical Court in that Sentence? "As far as yet appears no Marriage is proved." The Verdict upon an Indictment will say "It does now appear, that a Marriage is proved." The Two Propositions do not clash with each other; there is no Contradiction in them: To the Party it is said, you have not proved the Marriage; a publick Accuser does prove the Marriage; the Justice of the Country has brought out the Evidence of that Fact, which the Party either did not incline, or was not able, to produce. There is no Repugnance in the different Propositions, no Incongruity in supposing that the Sentence may stand as between the Parties, and yet shall have no Conclusion either as to the Publick, or as to Third Persons.

The Argument in Favour of the Sentence was supported by this Dilemma. What becomes of this Sentence, if the Indictment for Bigamy goes on? Is it null, or has it any Effect? Is the Party a Wife, or no Wife? I answer, to all Civil Effects no Wife, the Party has bereaved herself of any Right to Benefit by the Relation; to all Criminal Effects a Wife, because that Relation, the Duties consequent upon it, and the Responsibility for the Breach of those Duties, cannot be destroyed by the Act of the Party. I could quote to your Lordships other Cases, where the Party takes no Benefit from his Act, where he holds the Situation only to make himself amenable to the Justice of his Country. I refer to a known Case; a Man had committed an Act of Bankruptcy by Collusion with a Creditor, and a Commission of Bankruptcy was taken out against him, the Object of which was, to procure



ture a Discharge from his Debts. He chose to conceal a Part of his Effects, for which he was indicted upon the Statute making it a capital Felony for a Bankrupt to be guilty of any wilful Concealment; it came out clear as the Light, that he was no Bankrupt, that is, no Bankrupt to any Civil Effect; he could not avail himself of that Commission of Bankruptcy against any Creditor, that had a Mind to dispute it, except the Creditor who had colluded with him; but though he was in Fact no Bankrupt, he was tried and convicted as such.

My Lords, After the Indulgencé, with which your Lordships have been so good as to hear me so long upon this Subject, I am sorry to be obliged still to trespass a little longer upon your Patience, when I consider the Fourth Proposition, which certainly is not the least material; that is, that a Sentence, infected with Fraud, to which Collusion may be objected, is no Bar in any Cause. My Lords, upon that Head the Principle is so plain, that the Illustration of it will not run into much Length, and the Authorities are so decisive, that I shall only state, and not argue upon them.

A Sentence obtained by Fraud and Collusion is no Sentence. What is a Sentence? It is not an Instrument with a Bit of Wax and the Seal of a Court put to it; it is not an Instrument with the Signature of a Person calling himself a Register; it is not such a Quantity of Ink bestowed upon such a Quantity of stamped Paper: A Sentence is a judicial Determination of a Cause agitated between real Parties, upon which a real Interest has been settled: In order to make a Sentence, there must be a real Interest, a real Argument, a real Prosecution, a real Defence, a real Decision. Of all these Requisites not One takes Place in the Case of a fraudulent and collusive Suit: There is no Judge; but a Person, invested with the Ensigns of a judicial Office, is misemployed in listening to a fictitious Cause proposed to him: There is no Party litigating, there is no Party Defendant, no real Interest brought into Question; and to use the Words of a very sensible Civilian on this Point, *Fabula, non Judicium, hoc est; in scena, non in foro, res agitur.*

The Ground then, upon which I contend, that a collusive Sentence is no Bar, is shortly this; that such a Sentence is a mere Nullity. But it is insisted, that the Court which pronounced the Sentence can alone declare the Nullity of it, and till repealed, it must stand good and valid. The Authorities, to which I mean to refer upon this Head, will refute that Argument, at the same Time that they prove the general Doctrine.

The First is my Lord Coke's Reasoning in *Fermor's Case*, 3 *Coke* 77: He concludes the Resolution of the Case in this Manner, "Thereupon it was concluded, that if a Recovery in Dower or other real Action, if a Remitter to a Feme Covert or an Infant, if a Warranty, if a Sale in Market overt, if Letters Patent of the King, if Presentations and Admittances, that is to say, if all Acts Temporal and Spiritual should be avoided by Covin, for the same Reason a Fine in the principal Case levied by Fraud and Covin shall not bind." Nothing can be more explicit than these Words to shew, that there is no Necessity that the Covin should be prosecuted in the Court in which the Judgment was obtained. The Case of *Lloyd and Maddocks* in *Moore* 917, is a direct and a plain Authority; there a fraudulent Judgment was set up against a Plea of a Legatee in the Spiritual Court; the Question in the Court of King's Bench was, whether the Spiritual Court should be prohibited to enter into the Consideration of the Fraud of the Judgment, which is certainly not a Matter of Ecclesiastical Cognizance; but the Court was of Opinion, that the Covin was aptly examinable in a Court Christian to that Effect, and therefore the Prohibition was denied.

My Lords, The other Authorities are more modern, though not more decisive upon the Point than this. The First I mention to your Lordships is the Case of *Prudam and Phillips*: There is a very bad and a very inaccurate Note of it in Sir *John Strange*: The Note, from which I cite it, is a Manuscript Note of Mr. *Ford*. In that Case it was determined by Lord Chief Justice *Willes*, that a fraudulent and collusive Sentence against Mrs. *Constantia Phillips* was binding upon her, but he concludes it was binding upon no other Party; the Fraud was a Matter of Fact, which if used in obtaining Judgment was a Deceit upon the Court, a Fraud upon Strangers, who as they could not come in to reverse it, they could only alledge it was fraudulent. He said in that Case, that any Creditor of hers might reply that it was fraudulent, and avoid the Effect of it. The other Cases I refer to are, my Lord *Hardwicke's* Authority in the Case of *Roach and Garvin*, 1st *Vezey* 159; and in the Case of *Brownsword and Edwards*, 2d *Vezey* 246. In the Case of *Roach and Garvin*, the Question was upon the Effect of a Marriage, said to be established by the Sentence of a Court in *France*: Lord *Hardwicke* enters into the Consideration of it thus, "The Question is, whether this is a proper Sentence, in a proper Cause, and between proper Parties; whether a Marriage is had in Fact, or any Contract *in presenti*, as a Sentence in the Re-



“ ecclesiastical Court would be conclusive, unless there be Collusion, which would overturn the Whole.” In the other Case the Ground is exactly the same.

From these Cases I conclude it to have been the uniform Opinion of all the great Judges, who sat in *Westminster-hall* from the Time of Lord *Coke* down to the present Time (and the Courts were never more ably filled) that Fraud and Collusion not only vitiates, but absolutely annuls; and that a Sentence obtained by Fraud is, literally, no Sentence at all; therefore the Objection of such an Instrument, of so much Paper and Writing, is the Objection of a mere Nullity, and can have no Effect neither in a Civil nor in a Criminal Suit. Having troubled your Lordships so very long, I will take up no more of your Time, even to recapitulate the Heads of the Argument, but hasten to return my humble Thanks for the great Indulgence I have already experienced.

*Mr. Dunning.*

My Lords,

I purpose to give your Lordships very little Trouble; indeed I should be without an Apology, if I had thought of giving you much, finding, in the Station which I hold in this Cause, the Subject completely exhausted; and I cannot but suppose your Lordships Attention in a great Measure tired, notwithstanding the occasional Relief which the entertaining Parts of the Cause have afforded, has given you. I have the less Inclination to give your Lordships much Trouble, as I feel a Degree of Surprise, that it should have been thought necessary for the Counsel on the Part of the Prosecution to give your Lordships any.

My Lords, The Subject for immediate Consideration is the Competency of obtruding this Sentence, in this Stage of the Cause, to stop the Cause here, and to require of your Lordships to decide it without any regard to the Truth or the Justice of the Case; such however it is contended is the Effect of this Paper, that is offered to your Lordships under the Name of a Sentence of the Ecclesiastical Court.

The Novelty of the Attempt it is not my Intention to expatiate upon: It has been truly observed to your Lordships, that some Prejudice at least may be expected in the Minds of your Lordships against an Attempt so novel; for though I am not so blind an Admirer of Antiquity as to take for granted, that every Thing that is new is therefore wrong; sure I am, I am warranted in expecting your Lordships Concurrence in thinking, that those, who propose at this Time of Day to introduce into the Judicature of this Country a new Practice, ought to be prepared with such Reasons as should compel your Lordships Assent. This I think may be fairly insisted upon the Head of Novelty.

My Lords, The Gentlemen undertake to maintain, first, that this Evidence is competent and admissible; secondly, that it is conclusive; and thirdly, they insist on this Conclusion, not only upon the Supposition, that it is a Sentence fairly obtained between real Parties, after an adverse Agitation of the Question, which it is supposed to have decided; but though all these Circumstances should be totally wanting, and though the contrary of them all should be the Truth of the Case, the Sentence is insisted on as equally conclusive. In that Extent it is, that the Gentlemen have undertaken to maintain this Proposition; and a very considerable Task it seems to me they have undertaken. My Lords, I consider the Sentence as read only *de bene esse*, merely that your Lordships may know what the Contents of it are, that you may have the Assistance of that Knowledge in judging not only of the ultimate Effect of it, but of the Propriety of receiving it at all in this Stage of the Business. At the first Blush to be sure it seems a little absurd, that your Lordships should be to decide the Cause before you have the smallest Knowledge of what the Case is, that is to be stated upon the Part of the Prosecution. It is certainly necessary for those that are to judge of this Paper, to know what it is; it is a Sentence in a Court, of which your Lordships heard Yesterday abundant Commendation. It was observable, that those, who were most lavish in that Commendation, were least acquainted with the Practice of that Court. The First of the learned Doctors spoke with a very becoming Modesty of the Court in which he practises. The other explained to your Lordships the Nature of a Jactitation Suit as concluding nothing, being to be revived at any Time, and consequently having no End. It was contended by all the Gentlemen, that this Court was entitled not only to what on the Part of the Prosecutor we should have had no Difficulty perhaps to have admitted, to Co-equality with the Courts of Temporal Jurisdiction, but to something superior: It was contended, that there was something in the Nature of this Subject that made it peculiarly the Province of that Court to judge of and to decide upon; not that they have better

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Means of Information, not that they have better Rules of Decision; but from something unexplained in the Constitution of the Court, it was rather assumed than attempted to be proved, that to that Court exclusively belong Matrimonial Questions, Questions on the Rights of Marriage, and even of the Facts of Marriage. I am persuaded your Lordships all go before me in feeling a Conviction, that there is not in that Extent a Foundation for that Claim: Yet this Peculiarity of Jurisdiction, and the consequential Necessity, in order to get rid of the Sentence, to resort again to that Jurisdiction appeared to me to be the Points principally insisted on: Neither of them, I trust, your Lordships will think are made out at present. I am considering the first; that to certain Purposes, and with a View to certain Consequences, the Spiritual Court is the only Court in which Questions of Matrimony can be agitated, is most true. There alone it is, that the Party deprived of, and complaining of the Want of, Conjugal Rights, must resort to seek them: There it is, where the Party supposed to be injured by a false Claim of a Marriage, when none exists, can obtain Redress for that Injury: But to other Purposes, and various are those Purposes in which the Question of Marriage arises, whether it is to be examined into with a View to Temporal or Spiritual Advantages, whether it is to be examined into with a View to Rights derived from it, or Punishments for Crimes committed in Relation to it, to the Temporal and not to the Spiritual Courts belongs, I conceive, this Question of Marriage. My Lords, to suppose otherwise, would be to deny in Fact, that your Lordships sit here with any Jurisdiction at all; for if it were true in the Extent in which it was contended, that to the Spiritual Court exclusively belongs the Consideration and Decision of the Question, Marriage or no Marriage, it will follow by a necessary Consequence, that if there were no such Sentence as the present to be thrust in our Way, and to create this temporary Difficulty, for such I trust it will prove to be, if there had been no Decision in the Spiritual Court at all, your Lordships would only have been in the Possession of this Cause for the Purpose of Writing to the Bishop to know how the Fact stood, and from his Certificate to take your Ideas of the Question which you are to decide upon. The Gentlemen must maintain not only that there was not at the Common Law any Thing like a Jurisdiction, but that this Statute, which means in Terms to give a Jurisdiction, has not in Point of Effect given any. I am at a Loss to find a Way, consistent with what the Gentlemen have maintained, to deliver them from that Consequence: If they insist, that no Temporal Court has a Power to enquire into a Question of Marriage, it will go to that Extent. They have made a Distinction between those Cases, in which the Question is the Point of the Cause, and in which it arises incidentally. The Question does not arise at all, unless it arises materially; if there be any Thing in the Distinction, let us see a little how it will help this Argument. Was the Marriage the Gift of this Cause in the Spiritual Court? No: The Lady applies to the Spiritual Court, assuming that there was no Marriage, complaining of an Injury, which consists in the Circumstance of a Man who was not her Husband taking to himself and boasting (as a Man would be apt to boast in such Circumstances) of the Honour of bearing that Relation to her.

This Cause is not in its Nature a Question of Marriage, but of Defamation: If that, which the Lady suggested, had been admitted to be the Truth of the Case, he would have been to excuse or extenuate his Offence, just as the Nature of his Case would enable him to do, by either denying that he had boasted, or stating what had led him into it: But this Defendant says, No: I have held that Language, which you call boasting: I will not dispute with you the Propriety of that Appellation: I have called this Lady my Wife; because, whether it be my good or ill Fortune, she is my Wife. It is for that Reason, and that Reason alone, that I have held this Language, which is imputed to me as a Crime: I am no Criminal in holding this Language, for that is my Situation, and this is my Defence. Thus it is, that the Question of Marriage is introduced into the Cause; it is insisted upon as a Defence; as a Matter material to her Defence it is that the Question of Marriage in this Cause arises. Is it less incidental or more direct than the same Question arising in the ordinary Way, in which it arises in Temporal Courts? A Person, claiming to be the legitimate Son of his Father, commences an Ejectment, in which the Question of Legitimacy turns out to be the only Question in the Cause; it is essential to his supporting his Claim, that the Court, who are to judge of it, and the Jury that are to decide upon it, should be satisfied of the Facts, that the Claimant is the eldest and the legitimate Son of the Father. The Point of Marriage is not the Point of the Suit directly, immediately, ostensibly, and upon the Face of the Record in that Cause, but incidentally, materially, and necessarily that Point becomes a Point in the Cause. Just thus in my Apprehension this Cause stands; and, as applied to this Cause, the Gentlemen cannot avail them-



themselves of the Distinction between the Jurisdiction to be exercised incidentally, and to be exercised directly, upon the Subject of Marriage. One of the learned Doctors represented his Ideas of this Jurisdiction exercised in the Spiritual Court, as if it was a Jurisdiction to decide upon an abstract Question. I am persuaded the learned Doctor in the Use of that Word meant only to say, that in their Forms of Proceeding, and in some of those Causes which are instituted in their Courts, the Right of Marriage, in Contradistinction to the Fact of Marriage, was more immediately pertinent than in some of the Proceedings in Temporal Courts; which to be sure it is. In any other Sense of the Word the learned Doctor used it inaccurately; for that Court, any more than this or any Court, has no Jurisdiction to try abstract Questions of any Sort: No Question ought to be agitated in any Court whatever, unless it be a real Question springing from a real Interest, and between real Parties. To agitate any other Question is an Insult to the Court. There is a Sense in which the Court may be said to have agitated this, in the Nature of an abstract Question; for it is certainly true, if our Instructions have any Foundation in Truth, no one Circumstance of the actual Case of the Parties was before the Court, or made any Part of their Enquiry. I trust, I shall be thought to have done enough at least for the Ecclesiastical Court in admitting, that their Sentences are equal to our Judgments; that they are not entitled to more, I may safely contend, when I am admitting, that they are entitled to as much Attention as is due to a Decree of a Court of Equity or a Judgment of a Court of Law. In such an Admission, at one Time I should have been thought to have gone much too far: I trust, the learned Doctors will forgive me, if I cannot carry my Civility any farther. God be thanked we live at a Time, when a better Understanding of the Subject, and a more liberal Way of thinking upon every Subject, has so far abolished the antient Differences between the different Judicatures in this Country, that we and the learned Doctors may meet together without quarrelling. Their Proceedings in Cases in which it is competent to them to proceed, deserve the same Attention and Faith as those of Temporal Courts. This appears to me to reduce the Claim, upon the Part of those that are to support this Sentence, precisely to this Situation; and it is impossible to carry it one Jot further: It is an Opinion of a Court, not having superior or exclusive, but having a concurrent Jurisdiction of this Question; having competent Power to decide, and having no Powers to exclude another Decision elsewhere, where, for other Purposes, Criminal or Civil, it may come to be discussed, according to the Forms which those different Judicatures usually observe in their Proceedings, totally unobstructed or assisted by any Attention to what has passed in any other Judicature: This, I trust, will be your Lordships Judgment upon the Question agitated between us, if it should be material.

My Lords, I laid in my Claim to object to the Admissibility of this Piece of Evidence, upon which, if I should have the good Fortune to have your Lordships Concurrence, the subsequent Consideration of the Effects of it, if admitted, will become totally immaterial. I deny, that this is admissible in a Court like this; a Court of the highest criminal Jurisdiction in this Country.

My Lords, It is so familiar, that it would be impertinent to that Part of the Court to which I have the Honour to address myself, which is more particularly conversant in the Forms of Proceeding in Courts of Justice, to be labouring to prove, that when a Subject is examined into in the Course of a Criminal Enquiry, under the Form of an Indictment, or of an Information, what has passed or may pass in the Course of a Civil Enquiry upon the same Subject and the same Question, is not only not regarded, but is not admitted. In the Instance that was put, and many others that may occur to some of your Lordships, it is perfectly notorious, and therefore neither requires Argument nor Proof, that the Practice is certainly so. Let a Man be acquitted in a Court of Criminal Jurisdiction, it does not preclude a Party, complaining of an Injury arising from that Act, which in a Criminal Court has been presented as a Crime, from seeking Redress for the Civil Injury; and *vice versa*, the Fate of such an Action cannot be enquired into, much less cannot it preclude the Proceedings in a subsequent Criminal Enquiry, taking its Rise from the same Act. It has been enquired into in a Court of one Description, it is now enquiring into in a Court of another Description.

My Lords, One Reason (there are others, but) one Reason why Courts of Criminal Jurisdiction do not admit any Account of what has passed upon the Agitation of the Question in a Court of Civil Jurisdiction may be, the Liability to Fraud and Collusion. I am not now arguing upon the Fact of Collusion in this Case: But it is obvious that if this would do, if the Sentence of a Court of such Jurisdiction, whether Ecclesiastical or Temporal, will preclude a Criminal Enquiry, the Receipt is of ample Use; and all Men may,



if they please, cover themselves against the penal Consequences of their Crimes by instituting a friendly Suit. Some such we have known to have been so conducted as to escape the Attention of the Judges, who have not found out, till after the Cause has been decided, that the Cause has been collusive. Cases of this Sort are so open to Fraud and Collusion, that for this Reason, if there were no other, the Courts of Criminal Jurisdiction will always reject such Evidence. I do not know that Case has yet existed, where any Person has done so strange a Thing, as to put it in the Power of the Court to receive or reject by offering such Evidence. Your Lordships have had cited to you a Case, which, having been treated as it deserves, need not be repeated by me; the Case of *the King and Vincent*: If it were possible to suppose that Case could be Law, that Supposition is removed, when your Lordships are told that a different Opinion upon the same Point has been held by the Judges that have succeeded in the same Court, and to whose Knowledge or Ability nobody, that knows who they are, would, I believe, object. The last of these Cases, *the King and Stirling*, I am aware, may be attempted to be distinguished, and for what I know the First of them may, by saying that the Question did not occur, the Objection was not taken in either of these Cases; but your Lordships knowing before whom those Criminals were tried, will believe that no such Objection would have escaped these Judges, if it had been founded in Law, although no Counsel objected to it, or although the Criminals perhaps had not the Assistance of Counsel; therefore I consider that Case as fairly dismissed, and the subsequent Cases as carrying an Authority upon our Side that more than overturns it: But I do not conceive, that even this was wanting; for the Instrument in the Case of *the King and Vincent* has no Resemblance to the Sentence now offered; it was an official Instrument, necessary to give Sanction to a legal Right. Letters of Administration, or a Probate, may be admissible; but it does not by any Means follow, that a Sentence like this is admissible here; if it be, it must be equally admissible on all Sides. The Gentlemen argue, that your Lordships should receive it, should act upon it, should conclude upon it; why? because it is a Sentence rescinding the Marriage, declaring that there was no Marriage; that is the Import of this Sentence, and therefore it operates in their Favour, and therefore it happens that they produce it. Let me invert the Case; let me suppose, that when this Lady instituted that Suit, the Party, who was the Object of it, had supported that Defence, as we conceive he was very well able to have done, and that in consequence the Cause had ended in a Declaration or a Sentence, that there was a Marriage: In that Case would it have been Evidence upon the Part of the Prosecutor? Would it have been attended with those Consequences, which they are claiming for it now upon the Part of the Person prosecuted? Would your Lordships have endured, that the Prosecutor should have come here to support this Indictment by no other Evidence, than the Production of a Sentence in a Suit like this in the Spiritual Court, by which that Court had determined Mr. *Hervey* and the Lady he had married were Husband and Wife? Can I possibly state it to any Mind that comprehends it, that does not at the same Time revolt at the apparent Hardship and Injustice of such an Idea? And yet is there any Thing more true, than that a Record cannot be Evidence of One Side, which would not, if it had imported the Reverse, have been Evidence, and with equal Force of the other? I conceive it to be One of the fundamental Rules to determine what Evidence of this Nature is or is not admissible, that if it could not have been admitted on Behalf of the Party objecting to it, supposing its Import had been favourable to him, so neither shall it be admitted on the Part of the Person proposing it. I trust I may be warranted in presuming that your Lordships think as I do; that in order to support this Indictment something more than such a Sentence would be required from us; and that the Legislature in making this new Provision meant, that the Fact should be enquired into, as all other Facts are enquired into; that the Relation should be proved by those who were Witnesses to it, by those who can prove the Confession of the Parties to it, or by those who can give such other Evidence as Courts of Criminal Jurisdiction are authorized to act upon. Can any Thing then be more obviously unsuitable to any Ideas of Justice, than that the Enquiry should be precluded by a Record in Favour of One of the Parties, which might have been as favourable to the other Party, and which if it had been, would not have been regarded?

If your Lordships think fit to admit this Evidence, and by so doing to raise a Question upon the Effects of it, the Gentlemen argue with some Appearance of Triumph, that this Kind of Sentence is conclusive, for that there are various Instances, in which Sentences of these Courts, in which Judgments of other Courts, have been held conclusive; for this Purpose your Lordships are furnished with a great String of Cases, some of Condemnations in the Court of Exchequer, some even from Boards of Excise, some from Courts of Admiralty,



rality, some from domestic and some from foreign Courts. There has existed, and fully existed, such a Comity in the Practice of One Court towards the Proceedings of another, that, whether the Court be foreign or domestick, the Courts presume, that what is done is rightly done, that there has been no Collusion, that there has been no Fraud, that the Judgment and Decree is what it ought to be, the Effect of an adverse Suit between adverse Parties. Presuming the Effect of such Sentences, such Decrees and Judgments, in Civil Causes to have been what it has been stated to be, it must have been upon the Supposition and upon the Presumption that the Sentence or the Decree has been fairly and rightly obtained: But if this Degree of Conclusiveness were allowed to it in Criminal Cases, if such a Sentence were allowed to be conclusive, where the Parties are unprepared in Point of Evidence to impeach it, and if such were allowed to be the Effect of it in such a Case in Courts of Criminal Jurisdiction, it would obstruct the Course of Justice in a thousand Instances, and in Effect operate to the Repeal of this and many other wholesome Laws. In this Instance the Mischief would too be great if the Policy of this Law be questionable, if that which we call a Crime is an innocent Action. If there is no Impropriety in the Practice now brought under your Lordships Consideration, if Polygamy deserves Encouragement instead of a Check, then in another Character your Lordships will do well to repeal the Act; but do not do it in your judicial Character.

My Lords, Cases may be supposed, and we are in a Situation that authorizes us, nay, not only authorizes but requires us to suppose, the grossest Cases that our Imaginations can furnish. It is not difficult to suppose a Case, in which the directest Fraud upon the Court may be practised by Means of the grossest Perjury, and yet through the Collusion of the Parties it may be managed with so much Dexterity, that it would be impossible to get at them; and in all these Instances the Effect I am now deprecating would be of course let in upon the Criminal Jurisdiction of this Country.

My Lords, I am persuaded your Lordships will not do this. In what I have said upon this Point, I have anticipated in Part the Question which I stated as the Third in the Order, in which I purposed to consider the Argument on the Part of the Lady at the Bar. All her Counsel have attempted to contend for the Conclusiveness of this Sentence; and they all mean, I presume, to insist upon it as precluding an Enquiry into the Mode of obtaining it. The other learned Gentlemen will excuse me, if I seem to have been less attentive to what fell from them, than to the Second Counsel on the Part of the Lady. The Fact is, I heard him more distinctly than those who preceded or followed him. He chose to consider this Act as not having created a new Offence, but as having simply varied the Punishment and Mode of Trial of a known Offence, which existed as the Law stood then. I am at a Loss to comprehend, in what Sense this can be considered as having not created a new Offence. This Act declares something to be a Felony, which before was no Felony; this Act creates that to be a Felony, enquirable into in the Way in which other Felonies are by Law enquirable into, in a Case, that was before only cognizable as an Offence against the Canon Law, and enquirable into in a Suit, which had nothing for its Object but the spiritual Interest of the Party. I conceive it to be a new Offence in the same Sense, in which almost all the statutable Offences in this Country are new Offences: This Act has not only created a new Offence, but, as I conceive, abolished an old one; for I doubt whether it be now competent for an Ecclesiastical Court to proceed to enquire into Offences of this Sort, if it were (as has been supposed) their Practice before this Act. By the Custom of London a certain Species of Defamation is actionable there; and upon that Ground the Temporal Courts proceed in granting Prohibitions to stay Proceedings of the Spiritual Court in such Cases; so I apprehend the Courts would do here, if the Spiritual Court proceeded *pro salute animæ* in a Case of Polygamy. My learned Friend assumed, that this Sentence would stop the Proceeding of such a Cause in the Ecclesiastical Court, but referred to the learned Doctors to make it out; which the learned Doctors, I presume not liking the Reference, forgot to attempt; so it stands as a Point assumed, but not proved, that the Spiritual Court would at this Time entertain such a Suit, and that its Progress would be stopped by such a Sentence. Your Lordships heard a very pathetic Description of the melancholy Situation in which the Lady will stand under this Sentence, if this Prosecution proceeds, and in consequence of it she should be treated in the disagreeable Way to which the Act exposes her. She will nevertheless, it has been said, after having been punished as a married Woman, be totally destitute of any Advantage in present or future of that Marriage; she can never claim any Conjugal Rights, nor (if her Circumstances did not preclude the Necessity of her seeking it) could she compel any Maintenance from this Gentleman



leman during his Life-time, nor can she, if she survives this supposed Husband, support any Claim to his Fortune.

My Lords, The Husband is in the same lamentable Situation: It is equally incompetent to him, while this Sentence stands, to derive any Advantage in point of Comfort during her Life-time, or in Point of Succession upon the Death of the Lady. It may be so; but if it is so, it will not be the Effect of the Judgment your Lordships will be to pronounce: It is the Effect of those Practices between the Parties which have produced this Sentence, and which have made this their Situation and their State.

My Lords, It will be time enough to consider this Question, when the Case arises. If ever this Lady should re-assume an Inclination to establish that Relation, which in this Suit she has thought good to disclaim; or if it should ever be the Pleasure of the Earl of *Bristol* to connect himself again with this Lady under the Relation of an Husband; it will then be time enough to enquire, what they can or cannot make of such a Claim, or what the Impediments are, which they will have to remove in order to establish that Claim. As neither of these Cases are very likely to arise, it is immaterial to go further into the Enquiry of what may probably or possibly be the Consequence of them. It occurred to the learned Gentleman to consider, that it was very possible he might be led by this Train of Reasoning into the Consideration of the Effect of the Collusion. Your Lordships will permit me to remark, that the learned Gentleman, who spoke first upon that Side of the Question, chose to be perfectly silent upon this Head: He did not seem to know, that it would be likely to occur to us in the Consideration of this Sentence to suggest, that it was collusive; for unless it were by an Allusion to the Case of *Hatfield* and *Hatfield*, the Notion of Collusion, as making a Part of this Question, did not seem to have occurred to him. Mr. *Mansfield* saw the Certainty of the Collusion being introduced into the Argument: To obviate it he used Three Cases, Two that had been mentioned before, and a Third he introduced for the Purpose; the First, in the Order of Time, was the Case of *Kenn* in my Lord *Coke*, which whoever reads, will see that the only Point determined, and the only Point to be determined in that Case, was, that it was not competent for the Party to traverse an Offence that had been found against him: All the Rest is that Sort of Lucubration which adorns, and in many Instances improves the Reports of that learned Judge of the Decisions of his own Time. And this is the Use that is attempted to be made of this Part of the Argument; that it was founded in Falshood, and therefore was upon the Face of it collusive: The Falshood was, that the Party was in a Condition, as it turned out by subsequent Enquiry, to have made a better Case than he did make; and from thence it is to be taken for granted, that of Purpose and Design he abstained from making that Case that he did not make. Your Lordships know better the Nature of Business, than from such a Circumstance to infer a Fraud: The best bottomed Causes often miscarry for want of that Evidence, without which they cannot be supported. The next Case, that of *Morris* and *Webber*, from *Moore's* Reports, seems to me to be still less material or useful to the Purpose for which it is produced; that was the Case of a Divorce *propter impotentiam viri*; the Parties marrying afterwards, Fruit of each of these Marriages was the Birth of Children; perhaps it may occur, that that Circumstance did not afford a very decisive and conclusive Proof of the Negative of the Ground upon which that Decree was pronounced; it is not an impossible Case, that what had happened might happen, although the Divorce was perfectly well founded in point of Fact: But suppose it were taken for granted, that the Child must of Necessity be the Issue of a Man, who had been divorced *propter impotentiam*; yet that it must of Necessity be inferred from thence, that this Sentence was collusively obtained, remains to be made out. I conceive that this Case, any more than the One that proceeded it, does not afford a Colour to say, that the Question of Collusion and the Competency of going into the Question of Collusion occurred to the Court in either of these Two Cases. In the Case of *Hatfield* and *Hatfield*, a Man, who under Colour of being the Husband of the Woman, had taken upon him to release some Interest which she was intitled to, and he claimed to be intitled to in her Right, and the Question turned upon the Effect of that Notion; there was afterwards a Sentence between the Parties against the Marriage; whether the Means to obtain it were fair or foul, fraudulent or otherwise, were are left to guess at. Your Lordships will not, I presume, adopt all the printed Reasons, good, bad, or indifferent, that are offered to your Lordships at the Close of your printed Cases. Your Lordships Predecessors in that Case could do no otherwise than they did; they saw, that the Decision in the Court below was right, and upon that Ground they affirmed the Decree. Now what was the Thing decreed, and the Point in Controversy between the Parties? The Man, while he passed for this Lady's Husband, took upon him to release an Interest, which it was not competent



for him to release, whether he had or not that Character, the Subject of the Release being a Legacy, left to her under a Will, in such Terms as operated to give her in Equity a separate Interest. I need not contend that in a separate Interest of the Wife the Husband cannot controul or deprive the Wife of it by any Release of his. A Court of Equity had decided against the Party claiming under the Release, which, according to the settled Doctrine of Courts of Equity, it was equally bound to do, whether the Party releasing had or had not married the Woman whose Interests were to be affected by it; and the Question (Husband or no Husband) was just as foreign to the Merits of that Decision, as any Thing that could be talked about in the Cause. Totally therefore laying out of the Question all that had been said upon the Subject that was not necessary to the Decision of the Case, the House of Lords affirmed the Decree of the Court, because they saw it had rightly decided the only Point in Controversy between the Parties. These then are the Cases, upon the Ground of which, and upon the Ground of which alone, for I have not been able to collect a Fourth, your Lordships are desired to decline doing that in this Instance, which we contend your Lordships are bound in Justice to do; that is, to let us into the Enquiry by what Means this Sentence was obtained. The Gentleman, particularly, who made this Use of these Three Cases, could not forget the familiar Practice, which he is a Witness to every Day of the Year, of impeaching the Judgments of the Courts of Law, whenever they are impeachable upon the Foundation of Fraud and Covin. It never occurred to a Court in which such a Question arises to refer the Party, who makes a Complaint of a Judgment so obtained, to the Court in which it was obtained; or to direct him to institute a Suit to get rid of it; he impeaches it just when it affects him, and not further than as it affects him; beyond that it is a Matter of perfect Indifference to him, whether it stands or falls; for the Purpose of doing that, which alone he is interested in doing, the Party, who would otherwise be prejudiced by such a Judgment, is constantly and daily permitted to say, that this was a Judgment obtained by Covin: This Allegation is usually formed into an Issue, and if that Issue is determined in his Favour, though the Judgment stands as to every other Person, *quoad* him it is avoided in the Manner we are ready to avoid this Sentence. It was said, that the Reason why Creditors are permitted so to avoid Judgments set up to their Prejudice by Executors or Administrators, who seek to cover Effects in their Possession by false Judgments, is, because these People cannot be relieved in any other Form; it cannot be referred to any other Court. I am perfectly content to take that as the Principle; then it remains, in order to support this Distinction, for the learned Gentlemen among them to make out, that it is competent to his Majesty to make himself a Party to this Suit in the Spiritual Court, or to institute there, by his proper Officer, a new Suit to get rid of this Sentence. The Gentlemen have not attempted it; it would be ridiculous; and I fancy I may presume it will not be attempted: It is not competent, much less necessary, for the King or his Law Officers to go into that Court for a Purpose so idle as this. Taking this then to be the Reason, why it is admitted in Civil Causes to Creditors to get rid of Judgments, by which they are attempted to be injured, by shewing that they were collusive and fraudulent, does it not follow by Parity of Reason, that it is equally proper that the same Thing should be done here, supposing that your Lordships should for a Moment forget this to be in a Criminal Cause, in which the Reasons for so doing are so much the stronger? Another Distinction between this Case and that was attempted: It was said, this is not the Case of a Third Person complaining of an Injury arising by a Sentence, and wishing to avoid it so far only as it affects him; but it is a Suit instituted for overturning the Sentence. I apprehend it is not so; we contend for nothing but to lay this Sentence out of our Way, as applied to the present Subject; just as you lay out of the Way a Judgment between *A.* and *B.* where it is attempted to be used to the Prejudice of *C.* After your Lordships have convicted this Lady, if in the Result of the Enquiry it should be proved, that such is the Justice of the Case, I do not know that the Verdict or the Judgment in this Case will be Evidence upon an Enquiry into the same Facts for another Purpose. If the Result of the present Enquiry is understood to establish the Marriage, and to nullify the Sentence, it is, because the Sentence is in its Nature, when it comes to be enquired into, really and truly null and void; not because that such is the Effect of any operative Power and Force, that belongs to your Lordships Conviction. This is not a Prosecution for the annulling of that Sentence; this is a Prosecution to subject the Party to the Punishment, which is by Law due to the Offence charged upon her. It cannot be attended with any other possible Consequence: Upon the same Ground that the Sentence is attempted to be impeached here, it may be impeached every where, except by the Parties, who may perhaps have precluded themselves by their Conduct from Impeaching it.



My Lords, As there are no Authorities on the One Side, it remains for a Moment only to observe, that there are Authorities on the other Side: As applied to Civil Cases Two have been mentioned; the good Sense of both the Authorities, particularly of One, I should apprehend establishes this Proposition clear of all Controversy; for, when in the Case of the Action against *Constantia Phillips* of famous Memory, it was determined, that whatever Objections would avoid a Judgment in a Court of Common Law, would be sufficient to overturn a Sentence in the Spiritual Court, but none other; one should have imagined that the Proposition carried with it so much good Sense, that all the World should feel it and adopt it. The *Scotch* Case is by the highest Authority, and there the true Use that is to be made of a Judgment in another Court is ascertained and limited; it is Evidence; it is strong Evidence; but it remains to be explained; and still more, it remains to be laid out of the Case in a Cause like this, and in a Case like that of *Phillips*, where there existed a Ground to impute Collusion and Fraud to it. In *Phillips's* Case it was not permitted to her to avail herself of that Collusion and that Fraud. Why? because it was a Fraud of her own: But the learned Judge, when he refused to permit her to impeach that Sentence, which she had obtained by Collusion and Fraud, adds, according to Mr. *Ford's* Manuscript Note, that as against all others, whatever Objections would avoid a Judgment in a Court of Law, would be sufficient to overturn a Sentence in the Ecclesiastical Court. We desire to overturn this Sentence upon no other Grounds, than Sentences and Judgments in Courts of Law are every Day overturned by: They must continue to be so overturned in future, as long as there continues to be any Attention to Truth and Justice in the Decisions of Courts of Judicature. I do apprehend, that your Lordships will not think, that I take an improper Freedom with the Sentence or the Court, whose Sentence it is, by desiring that your Lordships will by-and-by form an Opinion of the Purity of their Proceedings by the Specimen, that we shall give you of them, when we come to state and prove the Means by which this Sentence was procured; and then perhaps your Lordships will see no Reason for raising it above the Level of other Courts, on which we are content to leave it. With your Lordships Permission I would supply an Omission, I meant to have stated in its proper Place; the Case of *Robins* and *Crutchley*. A Mrs. *Robins* commenced an Action of Dower, claiming a Share of the Succession to her supposed Husband Mr. *Robins*: This Lady had been claimed to be the Wife of a Sir *William Wolseley*: Sir *William* ———, upon the Supposition that she was his Wife, had instituted a Suit in the Spiritual Court, probably with an Intention to get rid of her, charging her with having committed Adultery with *Robins*: In the Course of that Enquiry in the Spiritual Court it came out to the Satisfaction of the Court, that she was the Wife of *Robins*, and not of Sir *William* ———. This Sentence was introduced in pleading in this Cause of Dower for the Purpose of repelling a Denial on the Part of the Heirs of Mr. *Robins*, that she bore any Relation to them or to their Ancestor. To that Replication there was a Demurrer, which brought under Consideration of the Court of Common Pleas the Effect of this Sentence so pleaded. The Opinion of the Court of Common Pleas was to allow that Demurrer; and though the Point decided may perhaps be only this, that that Sentence could not avail the Party in that Form of Pleading; yet I conceive that Point must be very erroneously decided, if the Sentence were of the Description, which has been attempted to be passed upon your Lordships; for if had been understood to be conclusive and preclusive of all further Enquiry, most undoubtedly it would have been a proper Subject to be introduced in pleading as a Bar to any farther Enquiry. Your Lordships, by looking into the only Report in Print of that Case (Mr. Serjeant *Wilson's*) will find, that the learned Judges of the Common Pleas, who decided it, seemed to be agreed in thinking, that it was very far from an established Point, that this Sentence was conclusive, that the Question could only be tried upon the Issue *ne unques accouple*, which your Lordships know to be the only proper Issue in a Question of Dower, and that Issue must be determined by the Bishop's Certificate. Now we are told that this Sentence is just equivalent to the Certificate of a Bishop: This was so far from being the Opinion of that Court, that they leave to the Bishop to judge for himself, what Regard he would pay to that Sentence on the Point which he was to certify.

*Doctor Harris.*

My Lords,

It would ill become me at this Time, after the Points, which have been proposed, have been so fully discussed by the Gentlemen who have gone before me, to take up much of your Lordships Time.

There are Two Questions, as I understand, before your Lordships.



The First of them is, Whether a Sentence in a Cause of Jactitation can be given in Evidence, as an absolute Bar to a Prosecution by the King? and the other is, Whether, on Supposition that a Sentence in a Cause of Jactitation can be given in Evidence, it will afford a complete Defence, so that no Proofs whatever can be admitted afterwards in order to counteract and impeach that Sentence?

How these Questions come before your Lordships; whether properly or improperly, is not for me to argue. It is out of my Profession to say any Thing about them; but as the Gentlemen on the other Side have been permitted to state them and argue on them, it is certainly necessary that they should also be discussed by the Counsel for the Prosecution.

In regard to the First Question, I shall not trouble your Lordships long, because the Discussion of it relates principally to the Practice of Courts of Law; but shall more particularly attach myself to the Consideration of the Second; as I shall in so doing have an Opportunity to say a Word or Two in Answer to what the Gentlemen have urged on the other Side, who are of the same Profession, and practise in the same Courts where I have the Honour to attend.

In respect to the First Question, Whether a Sentence of Jactitation is an absolute Bar, and can be offered as such, to a Suit at the Prosecution of the King, it is to be observed, that anciently the whole Cognizance of Marriage, with that of the Crimes attending it, was vested in the Ecclesiastical Courts: But those Courts being either remiss in the Exertion of their Jurisdictions, or, more probably, wanting Power to inflict an adequate Punishment sufficient to stop the Growth of the increasing Evil, and the Legislature, for constitutional Reasons, being both unwilling and unable to invest them with more Authority than they then had, the Aid of Parliament became absolutely necessary; and the Statute of *James the First*, on which the Prisoner stands indicted, was accordingly made; by which it was enacted, that if any Person being married, shall marry another, the former Husband or Wife being alive, *the Offence shall be Felony.*

Before this Statute the Ecclesiastical Courts had the Cognizance of the Crime of taking a Second Wife, or a Second Husband, whilst the First Wife or First Husband was living: But the Statute, as I understand, takes that Branch of the Jurisdiction, namely, the Power of inflicting any Punishment whatever on a Person guilty of Polygamy, intirely from the Ecclesiastical Courts; insomuch, that, if at this Time a Process was to issue from an Ecclesiastical Court in order to call any Person to account for Bigamy or Polygamy (whichever it may be termed) the Party cited might obtain a Prohibition from the Judges of the Temporal Courts to stop such a Suit, in the same Manner as a Prohibition may be obtained in case of a Prosecution in an Ecclesiastical Court for Perjury not committed in that Court, or for any other Crime punishable by a Statute. Now, my Lords, it is evident, that the One Court has lost what the other has gained, in respect to the Offence of Bigamy; so that the Temporal Court, or rather your Lordships, are able to judge of Bigamy, and of every Ecclesiastical Matter incident to that Branch of Spiritual Jurisdiction. It may here be observed, that a Jactitation Cause is described in our Books of Practice to be a *quasi* defamatory Suit; and most certainly it is so and nothing more, when a Person libelled against in Jactitation confesses the Boasting; as when a Man cites a Woman for Boasting, and she acknowledges the Jactitation; for the Cause ends here, and is strictly of a defamatory Nature. But I do not mean to deny, when the Defendant undertakes to justify, that the Cause then becomes truly matrimonial; for the Sentence will then necessarily be either, that the Parties are Man and Wife, or that the Plaintiffs or Party Agent is free from all matrimonial Contracts, *quantum nobis constare potuit*, or as far as to us as yet appears. But though a Sentence in these Words may have frequently been adjudged [as in *Jones and Bow*, *Cartbrow* 225—and in *Clews and Bathurst*, *Strange* 960.] to be binding on the Temporal Courts in Cases of Property, till reversed; yet it by no means follows, that such a Sentence can amount to an Acquittal of the Plaintiff from having any farther Evidence brought against him, the very Words, *as far as to us yet appears*, implying the contrary and evincing, that farther Proofs may legally be adduced in the proper Court. The Words of the Sentence speak sufficiently for themselves: There is no Occasion to have Recourse to Authorities from Books. Let it be supposed for a Moment, that the antient Jurisdiction remained in the Ecclesiastical Courts, and that they possessed their former Power; is it possible to conceive, that a Sentence like the present, pronouncing a Woman to be a Spinster, as far as to the Court as yet appears, could be a Bar to a Suit in the same or in another Ecclesiastical Court against the same Woman for Polygamy? If it could be a Bar, it would amount to an Acquittal, till the Sentence in the civil Suit had been reversed; which would be subversive of Justice by making the Commission of an undiscovered Crime in One Court a Shelter against the Punishment of that very Crime in another. If the Doctrine now contended-for should prevail, that the Offering of a Sentence in Jactitation, pronouncing the Party Agent free from

Matrimony



Matrimony as far as it as yet appears, is an absolute Bar to a criminal Prosecution, there would be an Opportunity on every Indictment for Polygamy to defeat the Statute; for in the Case of a Woman marrying Two Husbands, if the First Husband should consent to a collusive Suit, the Wife would have nothing to do but to cite the First Husband into an Ecclesiastical Court for Jactitation, if she apprehended a Prosecution on the Statute; and then either on Confession of the Boasting by the First Husband, or on his failing to prove his Marriage, if he undertook the Proof, a Sentence would be obtained, which would intirely defeat the Statute. That this House should give a Countenance to a Doctrine of such Tendency, is not to be imagined. It would be so far to restore the Ecclesiastical Courts to their former Authority, as to put it in the Power of evil disposed Persons to use those Courts to the Defeazance of the Statute, without giving back to the Ecclesiastical Courts a Jurisdiction to punish the Crime of Polygamy, which would thus go unpunished: It would be to render those Courts in this Respect hurtful, without affording them an Opportunity of being useful; and it would in Effect be to destroy a Law in your Lordships judicial Capacity, which had formerly on the maturest Consideration been established in this House as a Part of the Legislature.

It would now be improper for me to detain your Lordships any longer on this Question; which has been so ably and fully discussed already; and I shall trust, that your Lordships cannot be prevailed on to declare the Sentence in Jactitation conclusive upon this high Court, or to suffer it to be read judicially as a Stop to any Evidence which may be brought as a Proof of the Marriage of the Lady at the Bar with Mr. *Hervey*, now Earl of *Bristol*.

But on Supposition that the Sentence may be permitted to be judicially read, it may be necessary for me, in Contradiction to what the Gentlemen of my own Profession have asserted, to trouble your Lordships with a Word or Two in the briefest Manner I am able; in order to shew, that Evidence of a particular Kind may be given in all Courts, and at all Times, to rebut a Sentence in Jactitation in Disfavour of Matrimony, for the Purpose of relieving an injured Party and of punishing the Guilty.

It is a general Rule, which is not to be denied, that Respect is due from One Court in *England* to the Decisions of another; and that Comity is due to the Decisions of all foreign Courts; and it might be more accurate and more strictly true to say in general, that One Court in *England* is bound by the Judgments and Sentences of another; but the Generality of this Rule does not exclude an Exception, which in Reality affords a Proof of its Generality; for, under Circumstances, Evidence of every Sort, parol as well as instrumental, may be received in One Court to affect a Sentence in another. Fraud in a single Person, and Collusion, where there are Two or more, may be given in Evidence in the same Court in a different Suit, or in another Court, to affect the Parties to a Sentence; and of course to affect the Sentence or Judgment itself in some Degree.

It is true, that by the Ecclesiastical Law a Sentence in any Case obtained by Collusion may be declared void in the same Court in which it was pronounced, by means of a special Suit for that Purpose; and most certainly at the Suit of a Person having an Interest, who could not even have intervened at the Time when the Suit was pending; and such was the Case of Lady *Frances Meadows*, who had no Interest in the Years 1768 and 1769, when the Suit of Jactitation was pending: But it does not follow, because a Sentence obtained by Collusion may be annulled in the same Court where it was pronounced, that such Sentence may not be impeached by any Means whatever in another Court.

I shall not, in Proof of what I have advanced, detain your Lordships with a Repetition of the Particulars of *Fermor's* Case as reported in the Third Part of *Coke's* Reports. I shall only observe that it was a Case depending in the Court of Chancery in the 44th of *Elizabeth* before Sir *Thomas Egerton*, the then Lord Keeper, in which *Richard Fermor* complained, that *Thomas Smith* the Defendant was his Tenant, and had levied a Fine with Proclamations, in order to bar him of his Inheritance, by *Covin* and *Practice*. The Lord Keeper considering on one Side the Mischiefs which might arise from such Practice, and on the other Side considering that Fines and Proclamations are the general Assurances of the Realm, referred the Case to the Two Chief Justices, *Popham* and *Anderson*, who, after a Conference, thought it necessary, that all the Justices of *England* and Barons of the Exchequer should be assembled—they assembled accordingly, and it was at length resolved by the Two Chief Justices and Barons of the Exchequer, except Two, that *Richard Fermor* was not barred by the Fine with Proclamations. The Lord Keeper Sir *Thomas Egerton* commended the Resolution of the Judges, and agreed with them in Opinion.

The Precedents and Reasons, on which the above-mentioned Opinion was formed, have already been ably related, and are well known to some of your Lordships: It may suffice on my Part to add, that a Fine, the most deliberate (for it is Five Years in completing)

and



and of course the most solemn of all Judgments, was not deemed, in the Opinion of the Lord Keeper and Ten of the Judges, to be of Weight sufficient to protect a colluding Party; but was suffered to be impeached by the Admission of Evidence in another Court than that where the Fine was levied, in order to afford Relief to an injured Man.

It is said by Lord *Coke* in the same Report, that all Acts Ecclesiastical as well as Temporal shall be avoided by Fraud and Covin. And indeed if One Temporal Court is bound in Justice and Law to pay no Regard to the Judgment of another Temporal Court under the Circumstances above described, can any Reason be given, why the Sentence of an Ecclesiastical Court in such a Case should be treated with more Respect by the Temporal Judges, than they are obliged to pay to the Judgments of their own Courts?

But to the Honour of the Temporal Courts it must be said, that, as far as it is in their Power, they lend their Aid to the Ecclesiastical Courts in case of Covin and Collusion, by permitting the Ecclesiastical Courts to try such Fraud, even when committed in the Temporal Courts, as incidental Matter.

The Case alluded to is in *Moor's Reports*, Page 917, *Lloyd and Maddox*.

Mr. *Lloyd* a Legatee sued *Maddox* the Executor of the Deceased in the Spiritual Court for his Legacy. The Executor alleged, that all the Testator's Effects had been recovered from him the Executor, in a Court of Common Law, by a Creditor of the Testator. The Legatee alleged in his Turn, and undertook to prove in the Ecclesiastical Court, that the Recovery at Common Law was in consequence of Collusion or Covin between a pretended Creditor and the Executor. And, upon the Admission of this Plea in the Ecclesiastical Court, the Executor applied to the Temporal Court for a Prohibition, which was denied.

And from this it is evident by necessary Inference, that the Temporal Courts must have deemed themselves competent to judge incidentally of Covin or Collusion committed in a Spiritual Court, in order to relieve an injured Party or Suitor in a Temporal Court.

When this Liberty taken by One Court with the apparent Judgment of another, under Circumstances, comes to be considered, it seems to be founded on the strongest Reason: For when a Judgment has been procured by a Collusion of Parties, though it must stand on Record, and may not, I grant, be *actually* expunged or taken from the File, but by the Court in which it was given; yet it is certainly a mere Nothing to those, who, not being *privies*, can shew it false and covinous. It is a Sentence in which the Judge had never an Opportunity of doing real Justice—and is undoubtedly, what it has been justly stiled by a Writer on the Civil Law, a Stage Play, a prophane Mockery, or any Thing but a Judgment. It is not to the Disrepute, but to the *Honour* of a Court, as well as to the Benefit of the Publick, that such a Fraud should be detected. The upright Judge must of all Things wish it.—And confident I am, that to discover such a profligate Proceeding (from which no human Wisdom can protect the greatest judicial Abilities) could never be construed into a Breach of Comity between one Judicature and another; but, on the contrary, must be construed by the deceived Court as a Vindication of its Purity and a Rescue from an Attempt to load it with Discredit.

I must now own, my Lords, when I was informed that Doctors of the Civil Law were, by the Permission of your Lordships, to attend on the Part of the Lady at the Bar, and a Brief was given to me on the Part of the Prosecutor on that Account, that I was apprehensive of what might be quoted from such miscellaneous Books, as the Digests, the Code, and the Decretals in favour of Collusion, and to shew how honestly it might be practised under particular Circumstances. Nothing however of this Kind has been urged; and I have not myself, from any Inspection of the Titles and Text of the Civil and Canon Law, *De Collusione detegenda*, which treat principally of collusive Causes between Masters and Slaves, and between certain of the Clergy in order to defraud the Laity, been able to gather any other Idea than that Collusion between Parties to a Suit is a very high Offence; and such a One, I make no Doubt, for which colluding Parties might now be articulated against in the Ecclesiastical Court, where the Insult was offered, and be punished at Discretion by Ecclesiastical Censures. But a particular Discussion of the Nature of the Offence committed by Parties colluding in a Cause, how that Collusion is to be treated when discovered, and what Operation the discovered Collusion will have upon the Sentence, is rather to be expected from later Writers, and such Authors as *Menochius* in his *Consilia*, or *Scaccia de Re judicata*, than from the Laws in the Text of the Civil and Canon Law.

And these Authors agree in general in saying, *Quod lata Sententia per Collusionem habenda est pro Non-Sententia, et quod aliis non nocet, quamvis, sublata Collusione, noceret. Nam facta Collusione cum Adversario [says Scaccia] Sententia non prodest adversus tertium; vel quia tertius erat citandus, et tunc Victori non prodest Sententia, etiamsi eam obtinisset sincere.*



As when an Executor [for Example] desirous of proving his Testator's Will, omits to cite One among others of the next of Kin ; for in that Case the omitted Person may, if he thinks it for his Interest, oblige the Executors to prove the Will *de novo* at a subsequent Time, the Sentence establishing the Will under the Process, by which One of the next of Kin was omitted, being as to him in the true Sense of the Expression, *Res inter alios acta*.

The same Author proceeds by adding,

*Vel non erat citandus, quia Causa agebatur cum legitimo Contradictore; et tunc licet, si Sententia fuisset lata sine Collusione, tertio noceret, tamen, si fuerit lata per Collusionem, non nocebit.*

This may be explained by the following supposed Case: If an Executor to prove his Testator's Will should cite *all* the next of Kin regularly, but should collude with that next of Kin, to whom the Management of the Suit was intrusted, and prevail on him to faint-plead, and not put forth his Strength on account of some private Bargain, and by this Covin establish the Will; yet, though the Sentence in this Case would have bound the legal Contradictors, who had been all called, and also all other Persons whatever, if there had been no Collusion, it shall nevertheless not bind the injured Part of the legal Contradictors, on a Proof made of the concerted Fraud.

It must be allowed, that these Writers have not (as far as I have been able to observe) made mention of the Place or Court, where a Sentence collusively obtained is to be set aside; and if an actual Setting aside or total Reversal is meant, there is no Doubt, but that this must be done in the same Court where the Parties colluded, and in no other.

But if it is only asked, where and in what Court Evidence is to be received to relieve an injured Person, who was not a Party to the Collusion? my Answer is, that it is plain from these Writers, as well as from Reason, that it is to be received *in every Court*.

The Courts of Civil Law, known to these Writers, hear in the same Court and under the same Jurisdiction Causes of Property, and also Accusations which affect the Life of the Accused, exactly in the same Manner as our Admiralty Courts in *England* did before the 28th of *Henry VIII.* and therefore when *Scaccia* and other Writers, who entertain the Idea of the same Court having both Civil and Criminal Jurisdiction, say that a Sentence obtained by Collusion is to be regarded *pro non Sententia*, their Meaning fairly taken must be, that such a Sentence would be effectually avoidable, or rather disregarded *every where*, on a proper Proof made of the Fraud, by which it was obtained.

I am aware that the Case of *Mayo* and *Brown* was quoted by the Advocates on the other Side, as a late Instance, in which the present Judge of the Prerogative Court, Sir *George Hay*, whose Decrees will always have great Weight, was of Opinion, that he could not in his Court receive Evidence of a Sentence having been obtained by Collusion in the Court of the Bishop of *London*.

The Case, in brief, was as follows:

One Mrs. *Ailmer* died intestate, and Mr. *Brown*, as her Husband, obtained the Administration of her Effects. Lady *Mayo* had proved herself to be the Daughter of Mrs. *Ailmer*, and had cited *Brown* to bring in the Administration, and shew Cause why it should not be revoked, as unfairly obtained. *Brown* proved his Marriage to Mrs. *Ailmer* beyond a Doubt; but Lady *Mayo* then alleged, that *Brown* had been married to one *Ellen Cutts*, who was living at the Time of the Fact of the Marriage of *Brown* with *Ailmer*. *Brown* answered, that *Ellen Cutts* did once make Pretensions to him; but that in a Suit of Jactitation, brought by him against her in the Court of the Bishop of *London* in 1732, she was enjoined Silence by Sentence; and he was pronounced free from any Matrimonial Connection with her. To this Lady *Mayo* replied by Plea, that the Sentence had been obtained by Collusion between *Brown* and *Cutts*, and desired to be suffered to prove her Allegation.

Many of the Arguments were then used, which have been made Use of on the present Occasion; but the Judge did not, as I understand, reject the Distinction between receiving Evidence in Favour of an injured Person and being able to annul the Sentence, and absolutely deny his Authority to admit Lady *Mayo's* Allegation, but only appeared to make Choice of the Method of stopping the Cause in the Prerogative Court till Lady *Mayo* had applied to the Bishop of *London's* Court for Relief: And in so doing he laid great Stress on the Note in the Margin of *Strange's* Reports, Page 981, where it is said, that the Chief Justice of the Common Pleas, in the Case of *Prudham* and *Phillips*, held a Sentence in the Ecclesiastical Court to be conclusive, and would not receive Evidence of Fraud or Collusion in obtaining it. But it is evident from the very able Manuscript Note of the Case of *Prudham* and *Phillips* by the late Mr. *Ford*, whose Learning and Accuracy are



too well known to stand in Need of any Encomium, that the only Reason why Chief Justice *Willes* refused to suffer Mrs. *Phillips* to relieve herself by giving a Proof of Collusion in the Bishop of *London's* Court, was, because Mrs. *Phillips* herself was a Party to that Suit in the Ecclesiastical Court: So that in Truth and Fact the Decree made in the Prerogative Court in *Mayo* and *Brown*, appears to have been founded more on the uncertain Authority of the *Note* in the Margin of Sir *John Strange's* Reports, than on any other Precedent.

Now if a Suggestion of Fraud in a single Person, or Collusion between many, affords a Foundation for a Court, in which Causes of Property only are decided, to receive Evidence, that such Fraud or Collusion was used in obtaining a Sentence in another Court which has Jurisdiction in Cases of Property, it becomes necessary *a fortiori*, that a Court, held for the Punishment of Criminals, should admit Evidence to shew, that a Fraud or Forgery has been committed in a Court of Civil Jurisdiction: And there are strong Instances in the Law of *England* to shew, that Civil Judgments have been regarded not only as of no Weight to exculpate in Criminal Prosecutions, but on the contrary as Aggravations.

The Case of *Farr* in *Kelyng's* Reports is One of many strongly to this Purpose.

*Richard Farr*, having an Intention to rob the House of Mrs. *Stanier*, told an Attorney that Mrs. *Stanier* was his Tenant, and he could not make her quit his house: The Attorney proceeded regularly in a Cause of Ejectment; and one *Eleanor Chadwick*, an Accomplice with *Farr*, having sworn falsely that she had served *Stanier* with a Copy of a Declaration, Judgment was obtained, a Writ issued, the Woman was ejected, and her House was robbed by *Farr* and *Chadwick*, who had got legal Possession. *Farr* and *Chadwick* were afterwards indicted at the *Old Bailey*, and on Proofs given of the Facts, it was agreed by Lord Chief Justice *Hyde*, Sir *John Kelyng*, and Mr. Justice *Wild*, that though the Prisoners made use of the Law, and the Officers of the Law, yet as this was done *in fraudem Legis*, the Course they had taken was so far from excusing the Robbery, that it heightened the Offence by abusing the Law. *Kelyng's* Reports, Page 43, 44.

There is a single Case on the other Side, *the King* against *Vincent*, reported in *Strange*, 481, where it is said, that *Vincent* was indicted for forging a Will of a Personal Estate, and that the Forgery was proved at the Trial, but that *Vincent* having produced the Probate, it was held to be conclusive in Support of the Will.

This Opinion is said to have been given in the 8th Year of *George I.* and no subsequent Case has been quoted in Support of it; but Numbers of other Cases have been quoted by the Counsel against the Lady at the Bar, where the unfortunate Prisoners have been found guilty of forging Wills, in Part upon the same Evidence (namely, the Probate) on which the very fortunate Mr. *Vincent* was acquitted.

Among others cited from the State Trials and Session Papers, the Case of one *Stirling* has been mentioned, and a stronger to shew the Absurdity of the Doctrine held in *the King* and *Vincent* could not well be imagined:—One Mrs. *Shuter*, being known to have Money in the Funds, *Stirling* forged a Will for her; he gave considerable Legacies to several, but to himself he gave 30l. only as Executor; for it was sufficient for his Purpose to get Possession, in order to make her whole Fortune his own: He obtained a Probate from the Prerogative Court, and endeavoured to receive her Stock at the *South Sea House*, but was discovered in the Attempt, and indicted for the Forgery; the Probate was produced in Court, and according to the Doctrine in *the King* and *Vincent*, the Sight of the Probate should have instantly occasioned the Acquittal of the Prisoner; for though Mrs. *Shuter* herself was alive, and appeared in the Court, yet Witnesses must have been necessarily produced to prove her Identity; and such Evidence, according to the Doctrine in *the King* against *Vincent*, ought not to have been admitted against the Probate, which ought to have been conclusive. The prisoner however was convicted.

But admitting for a Moment, that the Case of *the King* and *Vincent* was legally determined, it does not seem to apply in the present Instance, unless it could be shewed, that the Prosecutor offered to give Evidence of Collusion in obtaining it, and was not permitted so to do; for it was said by One of the Civilians, that the Probate issued in that Case by a Decree of the Ecclesiastical Court, and not in common Form. If it did so issue, it is to be presumed, that such Decree was made between Parties truly adverse till the contrary is made to appear; and the contrary was not attempted to be proved; and it must be confessed, if the Parties to the Suit in the Prerogative Court were truly adverse, that then the Fraud either was or might have been in Proof before the original proper Court, and this might have afforded some Colour for saying, the Man shall not be put Twice upon his Trial for the same Offence; though such an Argument could only have been specious; for when the Question in a Court of Civil Jurisdiction is, *Will or no Will*,

*Deed*



*Deed or no Deed*, and a Forgery is detected, the Person who committed that Forgery, must be tried for it in another Court and by another Proceeding, or he will never be punished as the Law of *England* directs.

It may be here proper to observe, that no One Case has been mentioned by the Gentlemen on the other Side, where, in any Court of Civil or Criminal Jurisdiction, a Proof of Collusion in another Court had been offered by a proper Person and not received or rejected. The Case of *Hatfield* and *Hatfield* in the House of Lords in the Year 1727 has been answered by all the Counsel who have preceded me, by shewing that Collusion was not at Issue in that Case. And in the Case of *Kenn*, 7 *Coke*, so much insisted on by Doctor *Winne*, there is no mention nor the least Hint given of Fraud, Covin, or Collusion. In that Case *Christopher Kenn* had Issue *Martha* by *Elizabeth Stowell*, but he afterwards obtained a Sentence in a Cause of Nullity against, *Elizabeth Stowell*, as having been married to her *infra nobiles annos*; and the Marriage was pronounced void in an Ecclesiastical Court.

*Martha*, the Daughter of that Marriage, in order to make good her Title to her Father's Estate, was afterwards permitted, and probably through some Mistake or Haste in the Court of Wards, and without hearing Counsel, to give Evidence that *Kenn* and *Stowell* her Father and Mother were not *infra nobiles annos* when they intermarried. But according to Lord *Coke's* Report the Court of Wards agreed, that as the Ecclesiastical Judge had decreed the Marriage to be void, his Judgment should be credited, although the Parties were proved to have been of the Age of Consent, and although the Foundation was false on which the Sentence had been grounded; inasmuch as the Court of Wards would not examine into the Cause or Reasons of the Sentence, whether true or false.

From all which nothing farther is to be collected, than that a Sentence in the Ecclesiastical Court is to have full Credit given to it as long as it subsists unrepealed; and that it is not to be overturned in the same Court where it was given, or by any other, on account of Error and Mistake in Law or Fact; and this is certain Law: But it is to be observed, that the Parties divorced had been long dead before the Suit was commenced, and that there is not the remotest Hint or Suggestion through the whole Case, that the Ecclesiastical Court had been deceived by any Fraud or Collusion between the Parties litigant.

As to the Case of *Prudbam* and *Phillips*, the Counsel for the Lady at the Bar were certainly led into a mistake by the Note which I have already mentioned, inserted in the Margin of *Strange's* Reports, Page 961, and were not aware of the Note in Mr. *Ford's* Manuscript, which is of undoubted Authority, and from which it appears That one Mr. *Prudbam*, as a Creditor, brought an Action of Debt in 1737 against the well-known Mrs. *Teresia Constantia Phillips*.

Mrs. *Phillips* gave in Evidence her Marriage with Mr. *Muilman*.

Mr. *Prudbam* produced a Sentence annulling that Marriage in a Cause of Nullity on account of a prior Marriage with one *Delafield*; and this Mr. *Prudbam's* Counsel relied upon as conclusive Evidence of the Nullity of the Marriage with *Muilman*;—and so it was agreed, unless the Defendant *Phillips* might be admitted to shew Fraud in obtaining the Sentence, and so to avoid it, as Judgments are daily avoided, by Replications of Fraud.

“ Resolved, on great Debate, that the Ecclesiastical Law was Part of the Law of the Land, and that Sentences by their Judges were in Matters of Spiritual Jurisdiction of equal Force with Judgments in Courts of Record and in Courts of Equity: But that whatever Objections would avoid a Judgment, the same would be sufficient to overturn a Sentence in the Spiritual Court, but none other. That Fraud used in obtaining Judgments was a Deceit on the Court, and hurtful to Strangers, who, as they could not come in to reverse or set aside the Judgment, must of Necessity be admitted to aver it was fraudulent.

“ But that Mrs. *Phillips* had been a Party in the Cause in the Ecclesiastical Court, and whether she was imposed upon, or joined in deceiving the Ecclesiastical Court, this is not a Time or Place for her to redress herself.”

Now, although Mrs. *Phillips* was not in this Case allowed to allege, that the Suit in the Ecclesiastical Court annulling her Marriage was collusive, yet the Reason, on which the Court refused to allow her so to do, namely, her having been a Party to the collusive Suit, amounts to a full Proof, when joined with the other Doctrine laid down by the Court and related in the Case, that any Person not having been a Party would at all Times be permitted in a Court of Common Law or Equity to allege Fraud or Collusion to have been practised to his Injury in an Ecclesiastical Court.



On the Whole therefore it appears beyond a Doubt from the Instances which have been given, that in Civil Cases a Stranger is admitted in One Court to alledge and prove in his Defence, that a Sentence to his Prejudice has been pronounced in another Court by Means of Fraud and Collusion; and that a Prosecutor in a Criminal Prosecution is constantly permitted to do the same.

Taking it then for granted, that this in general must be conceded, it only remains to inquire, why Evidence, if necessary, should not be admitted to destroy the Force of the Sentence in the present Case, in Favour of the Crown and of the Publick, who were not Parties to the Jactitation Suit between Mr. *Hervey* and the Lady at the Bar, and yet are interested, if it is a Crime to marry a Second Husband whilst the First is living; or, in other Terms, to inquire why a Sentence of Jactitation of all Sentences should be so highly distinguished on account of its Worth and Stability, as to be held forth as an Exception to the general Rule, and as the only Species of Sentence which ought to be so favoured and honoured by being regarded as conclusive.

That the Proceedings in the Ecclesiastical Court are often rather of longer Duration than could be wished, is not to be denied; and that this principally arises from the Number of possible Appeals under particular Circumstances from the first Hearing of a Cause to what in general Cases may be termed the last, is equally true.

When a Sentence [for Example] given in a Cause of Jactitation, in which Marriage was at Issue, has passed through all the Stages of Appeal, the Cause is still liable to be opened *de novo* in Favour of Matrimony, as if nothing had been done. Was this possible Prolixity of Proceeding, and were these Opportunities of appealing an Impediment and Safeguard against Collusion (as One of the Doctors has gravely alledged them to be) I do not deny that a Cause of Jactitation must of all Causes stand fairest to be the most immaculate and most free from the Stain of Fraud. But, when it answers the Purpose of Parties to collude, is it to be presumed that those, who could begin a Cause collusively, would scruple to carry it on from one Court to another, till they came to the End of their Journey, if it was necessary so to do to obtain their End? The Truth however is, that several Appeals are not absolutely necessary; and that, when there is Collusion in a Cause, there is either no Appeal, or an ostensible One only, which is always subducted within a convenient Time; and the Gentlemen best know, whether an Appeal from the Sentence relied on in the present Case was subducted or not. A Sentence in Jactitation pronounced in Disfavour of Matrimony is defined to be transitory, and not final; and this Definition seems to be founded, as Absurdities sometimes are, on a Tenet of Religion;—the Religion I mean is that, which after having been received in this Kingdom for a long Series of Years, was afterwards and now is with reason protested against. In this Religion it is maintained, among other condemned Doctrines, that Marriage is a Sacrament, and not to be dissolved: And although it nearly amounts to a Certainty, that the Rites of Matrimony are not now quite so strictly regarded in *England* (as they have been heretofore) and that his Majesty's Subjects of almost every Description from the lowest to the highest have shewed an utter Abhorrence of this Doctrine of the Church of *Rome*, yet it is not to be wondered-at, that the antient Canonists, who were to a Man of the Religion I have just mentioned, and had the framing of the Code Ecclesiastical, should so fabricate or bend the Law, as to render it the Support of Marriage by every possible Method, and should lay it down as a Maxim, that a Sentence in a Marriage Cause should never, in their Language, pass into *Rem Judicatam*, or become a final Judgment, but be eternally open and liable to Revision and Reversal, notwithstanding it may have been established by Appeal upon Appeal, and even by the Judges of the Common Law in a Court of Delegates under the King's Special Commission, and afterwards by the Lord Chancellor, who may have refused a Commission of Review. *Clarke's Praxis, Title 205.*

To render the Privilege of a Jactitation Cause, in which the Proof of Marriage has been attempted but not perfected, still more extensive, the general Safeguard against Perjury has been entirely taken away in this Species of Suit; for the Publication of the Depositions is no Obstacle to fresh Examinations, and new Witnesses may continually be admitted in Favour of Matrimony, even after the former Depositions have been inspected, and without any Proof made that such Witnesses are lately come to the Knowledge of the Producer; which is a Proof expected and required in all other Causes whatever, and a Rule never departed from.

*Clarke* in his Book of Practice is express to this Purpose, and uses the following Words: *Licet generaliter non admittuntur testes post Publicationem, admittuntur tamen in Causa Matrimoniali sine Juramento, quod testes noviter ad notitiam pervenerunt.* Tit. 205. It is allowed



allowed too in this Species of Cause, that not only the Party silenced, but that any other Person, interested to establish the Matrimony, may take up the Cause in the State in which it was left in the same Court, and proceed, as I apprehend, in another Court, and invoke or illate the Proceedings.

The *Pars Citata*, or Defendant, is also at Liberty to go into another Court in a new Matrimonial Cause; as for Example, in a Cause of Restitution of Conjugal Rights: *Licere Parti citatæ aut in eodem judicio, aut coram alio judice (non obstante quod citatio emanavit in Causâ Jactitationis) contra actorem instituere Causam Matrimoniam.* See Clarke's Praxis, Tit. 195, 205.

This ambulatory, indeterminate, State of a Sentence in Jactitation must certainly, in the Apprehension of any Man not a Lawyer, be a very improper Circumstance to be urged in order to render this Species of Sentence given in One Cause an absolute Bar to proceeding to Judgment in another Cause of a Civil Nature, and more particularly to make it a Bar in a Cause of a *Criminal Nature* in another Kind of Jurisdiction: Taking Things therefore as they are, and having proved the Law respecting this extraordinary Species of Sentence from the Books of Practice which describe it, can any good Reason be assigned why such a Sentence should be conclusive in the present Case, and should not be revised and revoked, if Occasion should require it, in the High Court before which we now are?

This Sentence never passes into a *Rem Judicatam*, or Final Judgment—it is subject to be revised in any other Court having Jurisdiction than that in which it was first given. The Act of James I. by which the Marrying of a Second Husband or Second Wife, whilst the First is living, is made Felony, has by creating the Felony plainly transferred that Branch of the Ecclesiastical Jurisdiction, which before punished Polygamy, to those Courts where Criminals are tried; and to remove even the Appearance of any Difficulty which might have arisen on the Right of the Prosecutor to offer the Sentence, the Counsel for the Lady have themselves desired Leave on her Part to bring it before the Court, and have actually introduced it:—Can it therefore be possible that this High Court should not think themselves authorized by a complete Jurisdiction in every Respect, Spiritual as well as Temporal, to give the Prosecutor, on the Part of the Crown and of the Public, the Liberty, under all the Circumstances of this Case, of offering a Proof of the Nullity of the Sentence, by pointing out from the Proceedings themselves, if Necessity should require it, the Marks of Fraud, with which they abound; or, what is rather to be expected, to give the Prosecutor the Liberty of adducing Evidence in a more direct Manner, both oral and instrumental, to prove the Marriage of the Lady at the Bar with Mr. *Hervey*, the present Earl of *Bristol*; by which the collusive Proceedings before the Ecclesiastical Court, and the Truth of the principal Accusation, will at one and the same Time be plainly demonstrated?

*Lord President of the Council.* My Lords, I move your Lordships to adjourn to the Chamber of Parliament.

*Lords.* Ay, Ay.

*Lord High Steward.* This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same Order they came down; and the House being thus resumed, Resolved to proceed further in the Trial of *Elizabeth* Duchess Dowager of *Kingston* in *Westminster Hall* on *Friday* next, at Ten o'Clock in the Morning.

## FRIDAY, APRIL 19. *The Third Day.*

THE Lords and others came from the Chamber of Parliament in the same Order as on *Tuesday*; and the Peers being seated, and the Lord High Steward in his Chair, *Lord High Steward.* My Lords, The House is resumed. Is it your Lordships Pleasure the Judges may be covered?

*Lords.* Ay, Ay.

Then the Serjeant at Arms made Proclamation for Silence; and the Duchess of *Kingston* was conducted to the Bar.

*Lord High Steward.* Mr. *Wallace*, you may proceed with your Reply.

Z

(R E P L Y.)



( R E P L Y. )

*Mr. Wallace.*

My Lords,

I must bespeak your Lordships Indulgence to examine and discuss the great Variety of Arguments and Considerations, which the Counsel on the Part of the Prosecution have thought proper to enter into, and submit to your Lordships. I ought in the first Place to take some Notice of the Charge of Novelty imputed to myself, and those who assist me, in the Attempt to introduce the Sentence of the Ecclesiastical Court, before the Cause has been opened, or the Evidence on the Part of the Prosecution stated to your Lordships.

It might perhaps be thought a sufficient Answer to observe, that no Indictment ever yet has been preferred on this Statute, where the Ecclesiastical Court had given a Sentence upon the Subject. The Prosecutor of this Indictment has had the Boldness to set at Defiance the Proceedings in the Ecclesiastical Court; and, in direct Opposition to a Sentence pronounced there, to prefer in a Court of Criminal Jurisdiction a Charge of Felony; for although Criminal Prosecutions are and must be in the Name of the Crown, yet in most Cases they are carried on by private Individuals; and your Lordships particularly know, in the present Case, there is a private Prosecutor, and one, who might have applied on the Score of Interest to the Ecclesiastical Court to have had that Sentence re examined.

With Respect to the Novelty of the Proceedings, the Counsel for the noble Lady at the Bar would have found themselves standing much in Need of your Lordships Pardon, if they had not interposed the Sentence at the Time it was offered. If they had permitted a Cause of this Kind to have proceeded into Evidence (which, from the Accounts we have heard, is to be laid before the Court by a Number of Witnesses, and of course must have taken up your Lordships many Days in the Examination); and after all the Sentence had been produced and attended with the Effect, which we hope it will have; what would have been the Situation of Counsel, who had suffered so much of your Lordships Time to have been mispent in the Examination of parol Evidence to Facts, which could not be admitted against the Decision offered to your Lordships?

But in Truth it is not new in Practice; the Case alluded to is not only, as it has been termed, a Colour, but a Justification for what has been done. It is true, it was an Ejectment, which the Gentlemen have properly called a fictitious Proceeding. It was for that Reason the Sentence was not interposed, till the Evidence was opened; for till then the Defendant is ignorant in what Manner the Plaintiff intends to make out his Claim; but as soon as it was stated, that he derived through a Marriage, which had been examined and decided in the Ecclesiastical Court, the Counsel immediately, without suffering Evidence to be given, interposed the Sentence. In this Case there is no Occasion to wait for the Opening of Counsel; for upon the Face of the Indictment the supposed Marriage with Mr. *Hervey* is stated as the Ground of the Offence: The Crime in the Indictment charged is a Marriage with his Grace the Duke of *Kingston*, during the Life of Mr. *Hervey*, to whom the noble Prisoner at the Bar is alledged to have been before married; and consequently upon the Validity of that Marriage the Question depends. The Marriage with the Duke of *Kingston* was notorious in the Face of the Church, under the Sanction of a Licence from the Archbishop of *Canterbury*, and in the Presence of many Witnesses. The supposed Marriage with Mr. *Hervey* was the sole Question in the Ecclesiastical Court: That Court has decided against it; and as long as that Sentence remains in Force, the Relation of the Parties as Husband and Wife is at least suspended, if not absolutely gone.

The Practice every Day, where One is in Possession under a Fine, and no Claim has been made for Five Years, is to interpose it immediately. I ventured to do it not long ago in the Court of King's Bench at a Trial at Bar, where the Claimant came out of *Wales* with as long a Pedigree as that Country could furnish: When I heard it stated, and understanding that a great Number of Witnesses must be called to support it, I offered the Fine to the Court, before a Witness was called; which instantly put an End to the Cause. I did not by that incur any Censure from the Court, or Blame from the Counsel. I thought myself called upon in Duty to inform the Court of it; and a Cause, which would have lasted Three or Four Days, was ended in less than Ten Minutes.

I trust, a Conduct designed to prevent your Time being mispent upon a fruitless Enquiry, (for whatever should be the Result, yet this Sentence, if it has the Effect we contend for, must render it totally nugatory and immaterial) will not be the Subject of your Lordships Animadversion.

Enough,



Enough, I hope, has been said in Defence of the Attempt against the Charge of Novelty; but an Observation was made, to create a Prejudice against the Case of the noble Lady at the Bar, from the Conduct of her Counsel in this Stage of the Proceedings to prevent an Examination of Witnesses, as a Proof of their Opinion upon the Merits of the Cause. God forbid that any Impression should be made against the noble Prisoner at the Bar from the Conduct of her Counsel! Your Lordships know, that in the Forms of Proceeding she must throw herself upon her Counsel, and submit to their Management; and no Mistake of theirs will, I trust, ever turn to her Prejudice. I feel an Happiness in speaking to a Court incapable of receiving Impressions from an Insinuation of that Kind.

An Observation was made upon the Form of the Sentence, which seemed to strike many of your Lordships; that as far as it appeared to the Ecclesiastical Court, the Parties were free from all Matrimonial Contracts and Espousals; not positively that they were so; and therefore as far as the Evidence went in that Court, and no farther, ought the Sentence to be regarded. Your Lordships have heard from those that practise in the Courts of Ecclesiastical Law, from the Counsel on both Sides of that Description, that it is the constant uniform Method of drawing up Sentences in Causes of this Kind; that it is a Sentence of Validity; that it is considered by them as such; but that it is open to further Proceedings in that Court; that it falls within the Maxim, which was cited to your Lordships upon the other Side, which is not denied here, but admitted, nay mentioned in the very Opening of this Business; that *Sententia contra Matrimonium nunquam transit in Rem judicatam*; this Sentence, being against a Marriage, never passes into a definitive Judgment of that Court: But does it follow, because it is open to further Examination, because other Suits may be instituted which may contradict this Sentence, that whilst it remains unimpeached, till other Suits are instituted, and till a different Judgment is given, that the Sentence has no Effect; that it is the Words of the Judge, without having any Sort of Consequence attending of them?

My Lords, It is too ridiculous to suppose a Suit instituted in the Ecclesiastical Court, where the Prosecutor of the Suit (or the Promoter, in the Language of that Court) has obtained the Sentence of the Court in his Favour, that it means nothing at all; that it is meer Waste-Paper; that he might as well never have commenced the Suit. Is it possible in a Country, where the least Idea of Justice prevails, that this should be the Case? On the contrary, the Sentence of every Court of competent Jurisdiction has been considered in the same, and every other Court where it has become the Subject of Debate, till impeached, set aside, reversed, or repealed by the Court that gave the Sentence, or by the Authority of a Court of Appellant Jurisdiction, to be conclusive.

Your Lordships have heard from the Doctors of the Civil Law the Effect of a Sentence in a Suit of Jactitation of Marriage. I took the Liberty of stating to your Lordships many Cases referring, where the same Doctrine had been adopted by the Judges of the Common Law, and constantly acted upon without an Exception. The Proceeding is not, as has been contended, in the Nature of an Action for Words, or of Slander; it has ever been instituted upon some serious Claim of Marriage, which calls upon the Party for an Explanation.

Would it be no Objection with a Lady to a Gentleman paying his Addressee to her, that somebody claimed a Marriage with him? I believe, my Lords, it would at least create a Pause in the Treaty, if it did not absolutely put an End to it. He certainly would be called upon by the Lady or her Friends to satisfy them, that there did not exist a Ground for such Report. There is no legal Course to be taken, but by commencing a Suit of Jactitation in the Ecclesiastical Court. The Proceeding calls in Form upon the Party, who has made the Claim, to justify it. If a Marriage be insisted on, the Parties instantly change Situations; the Defendant becomes the Plaintiff or Actor, and the original Plaintiff becomes the Defendant, and is called upon to answer that Claim made in the Ecclesiastical Court of Marriage, not only to answer it in Form, but upon Oath: The original Plaintiff is obliged on Oath to declare, whether the Allegations of the Party respecting the Marriage are true or false. The Proofs are first made by the Party insisting upon the Marriage; and the Judge gives Sentence upon them. The Suit in Truth becomes, and is admitted by the learned Doctor on the other Side to be, to all Intents and Purposes, a Matrimonial Cause; and the Judgment is upon the Validity and Lawfulness of the Marriage. In that Light the Proceeding in the Ecclesiastical Courts has ever been received and treated.

But suppose the Sentence has been received and considered as conclusive Evidence, it is contended by the Counsel for the Prosecution to be only in particular Cases, namely, where  
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the Person against whom the Sentence has been given, or one deriving under such Person, has been a Party in the Suit, in which the Sentence has been offered in Evidence; which is not the present Case, as the Crown was no Party to the Suit in the Ecclesiastical Court.

The Distinction may be thought ingenious and plausible; but there is no Foundation in Law to support it. In the great Number of Authorities cited to your Lordships, there is not the least Hint of such a Distinction: The Rule is laid down in the most general Terms, and without an Exception, in the Case of *Hatfield* and *Hatfield* before the House of Lords. The Person against whom the Sentence was given in Evidence, was not a Party, nor claimed under any Party, to the Suit in the Ecclesiastical Court.

No Notice was taken of another Case which I mentioned to your Lordships, where the Person against whom the Sentence was given in Evidence, was no Party to the Proceedings in the Ecclesiastical Court. It was an Action against Mr. *Thomas Hervey* for a Debt contracted by his Wife. Mr. *Hervey* had a Judgment in that Suit against him: But in a subsequent Suit, after a Proceeding had in the Ecclesiastical Court, in which it was declared that Mr. *Hervey*, as far as appeared to the Court, was free from all Matrimonial Contracts (just as it is in the present Case) the Sentence was received as conclusive Evidence upon the Fact of the Marriage, and defeated the Plaintiff.

I am not contending, that such Sentences are to be used as Instruments of Frauds upon Creditors. No; if there is no real Marriage, but a Man holds out to the World a Woman for his Wife, and she gets a Credit upon that Score, he shall never be permitted to say they are not married: Yet where the Persons live separate, where no Act of his gives a Countenance to the Demand, there a Creditor trusts the Wife upon the Ground of a legal Marriage; there the Ecclesiastical Court deciding upon the Marriage is conclusive Evidence. That Case was acquiesced in; no Application was made to the Court; and I believe all that heard it approved of the Decision.

A learned Friend of mine on the other Side, after he had as I thought closed his Argument and sat down, rose again to mention a Case to your Lordships of *Crutchley* and *Robins*.

It must have struck him that it would appear a little extraordinary, after so full a Discussion, no Case had been cited to your Lordships to warrant or give a Colour to the Distinction attempted.

That Case, when stated, and the Reasons given by the Court which pronounced the Judgment considered, will appear not to have the least Application to the present. It was a Claim of Dower by Mrs. *Robins* upon the Estate of Mr. *Robins* deceased, in *Staffordshire*: The Defendant in that Case, the Heir of Mr. *Robins*, pleaded to that Claim, that she never was lawfully married to Mr. *Robins*. The only legal Mode of trying that Fact is by a Certificate from the Bishop of the Diocese: The Pleading between the Parties is brought to an Issue; it is the Office of the Court to direct a Writ to the Bishop to certify whether there was a Marriage or not; and upon the Certificate, the Judgment is given. Instead of suffering the Court to issue a Writ to the Bishop, Mrs. *Robins* replied to that Plea a Sentence in the Ecclesiastical Court in a Suit, wherein she was by the Judgment of that Court pronounced the Wife of Mr. *Robins*; the Defendant put in a Demurrer, insisting the Replication was not admissible: And that was the Question before the Court of Common Pleas.

Did the Court of Common Pleas decide, that such a Sentence is not Evidence? No; the Court of Common Pleas determined, that by Law they could receive no other Evidence of the Fact than the Bishop's Certificate; it was the sole Proof which the Law in that particular Case has required for the Decision of the Cause, and they could not depart from it. But they went farther in that Cause; they told Mrs. *Robins* that the Sentence, though it could not be received there, might be laid before the Bishop, who was to certify to them the Marriage. That is the Language of the Court of Common Pleas upon the Case: The Bishop must certify the Marriage; the Sentence must be laid before him, and not before this Court. Did the Court of Common Pleas decide, as contended, that it was no Evidence? No such Thing is to be found in the Case. All the Court did, or meant to do, was to inform the Plaintiff that she had mistaken the Time and Place to make Use of that Evidence; that the Law had in that Case appointed a certain specific Proof to be given to the Court, and they could receive no other: The Bishop, who was to examine into the Matter, might or might not be concluded by the Sentence; the Court must be determined by his Certificate.

My Lords, If the Bishop had rejected the Sentence, he would have done what no Bishop ever did before; yet the Court must be concluded by his Certificate; they could not

examine



examine into the Proofs: Nay, if the Bishop by Fraud had certified a Marriage, the Court would have been concluded. So much for that Case which has been cited; and which is the only Case the Industry of the Gentlemen on the other Side could produce upon this Part of the Argument.

Your Lordships have been told, that by the general Rules of Evidence in Civil Cases no Sentence or Judgment can be received, unless in a Cause between the same Parties, or who derive under them. The Candour of the Gentlemen on the other Side has admitted Two Exceptions to the Rule: First, Sentences or Judgments, where the Proceeding is *in Rem*; and Secondly, in Causes where the Court has exclusive Jurisdiction.

I will not state to your Lordships other Exceptions to the Rule; the Two admitted are sufficient; the present Case falls within both Exceptions, though either would be enough.

In the first Place, it is a Proceeding *in Rem*: Marriage or no Marriage is the Point to be determined. It does not come collaterally or incidentally, but directly, in Question; and the Decision of which was the sole Object of the Suit.

In the next Place, it is a Sentence of a Court having exclusive Jurisdiction upon the Subject. It is admitted that the Ecclesiastical Courts have exclusive Jurisdictions in Probates of Wills, in all Testamentary Disputes respecting personal Estates; and having decided the Question, whether right or wrong, upon true or upon false Grounds, it is not competent to any other Court, unless in a legal Way by Appeal, to enter into the Matter; but Faith and Credit is to be given to the Decision of the Ecclesiastical Court. It is also admitted, that till the Statute, upon which the present Indictment is founded, the Ecclesiastical Courts had the sole and exclusive Jurisdiction in Matrimonial Causes.

But it is contended, that a concurrent Jurisdiction is given by this Act to the King's Temporal Courts: Where is the Ground of this Notion to be found? Was it the Intention of the Legislature to give to the Temporal Courts a concurrent Jurisdiction with the Ecclesiastical? The Intention must be collected from the Act itself. In my own Apprehension nothing is more clear than that the Legislature, at the Time of passing this Act, meant to guard and secure the Jurisdiction of the Ecclesiastical Courts against Innovation from the Temporal.

The Act is general; that whoever shall marry a Second Husband or Wife, living the former, shall be deemed a Felon, and suffer the Pains of Death. Yet that general enacting Clause is restrained by a Proviso, which demonstrates the Intention of the Legislature, that the Proceedings in Ecclesiastical Courts should remain untouched, and the Temporal Courts have no Jurisdiction in the Case. The Exception runs thus:—Nothing herein contained shall extend to any Person or Persons, that shall at any Time of such Marriage be divorced by any Sentence had or shall be hereafter had in Ecclesiastical Courts; nor to any Person or Persons ———

These Provisions shew an Anxiety in the Legislature to preserve the Privilege of the Ecclesiastical Court, and save their Judgments from an Examination; and so far from giving a Jurisdiction to the Temporal Courts in such Cases, the Act expressly declares, that where the Ecclesiastical Courts have given a Decision, the Temporal Courts must stop. The Case is not within the Law; it is not permitted to be examined into.—It is pretty extraordinary that History gives no Account of this Act, or the immediate Occasion for passing it. The Preamble states, that evil disposed Persons, being married, run out of one Country into another, to Places where they are not known, and marry there. If this was the Evil meant to be redressed, the Case of a Person of Rank, obtaining a Sentence in the Ecclesiastical Court, and acting under the Faith of it, can never fall within the Description in the Act.

The Journals of neither House furnish any Lights upon this Subject. The Act was brought into the House of Commons in *April*, received some Amendments in a Committee there, and sent to the House of Lords; it there also received Amendments; and was returned to the House of Commons again in *June*: But what the Amendments were, or whether the Provisoes were inserted by the Guardians of the Rights of the Church, as is most probable, or came from the House of Commons, cannot be discovered. Suppose a Sentence of Divorce pronounced in the Ecclesiastical Court; would it be permitted to any Court, under Pretence of Fraud, to examine for the Purpose of making the Parties Criminals, when the Act has declared such a Sentence shall not be meddled with; and the Parties, under such Sentences, are excepted in Terms out of the Act?

Where a Sentence of Nullity of Marriage is given, it is equally open to future Examination in the Ecclesiastical Courts with a Sentence of Jactitation. If this be doubted, your



Lordships, from the Abilities and Integrity of the Gentlemen who assist us, though Counsel in the Cause, will receive satisfactory Information.

A Sentence of Nullity of Marriage is excepted by the Words of the Act: And would it not seem extremely inconsistent and harsh, that, where a Marriage is doubtful, and the Ecclesiastical Courts have declared it null, neither Party can by a subsequent Marriage be in the Predicament of a Felon; and yet a Person, who is by the Sentence of that Court declared never to have been married at all, and to be free from all Matrimonial Espousals, is to be a Felon? Such a Construction on a Penal Law would be monstrous.

The Intention of the Legislature is to me as clear as Language can make it, that Matrimonial Causes should be still within the sole Jurisdiction of the Ecclesiastical Courts; and that the Temporal Courts should have no Authority to examine into their Decisions; by declaring, that wheresoever these Sentences obtain, the Party marrying whilst they are in Force, shall not be a Felon; and yet the former Marriage, if it were a legal one, is not done away: It is capable of being revived, and a Second Marriage would be null and void. And upon another Proceeding, if the Sentence should be in Favour of the Marriage, either Party may commence a Suit for Restitution of Conjugal Rights; the First Marriage would be established, and a Second Marriage, pending the Sentence, void; yet the Party would not be in the Predicament of a Felon. This is clear from the Act of Parliament; and in this Sense your Lordships will give me Leave to use it, as shewing beyond a Possibility of Doubt the Intention of the Legislature. Where then are the Arguments we have heard, that the Legislature meant in this Case to give the Common Law Courts such concurrent Jurisdiction, as to disregard the Sentences of the Ecclesiastical Courts? Has the Legislature said so? Has not the Legislature said the Contrary in express Terms? Wherever a Sentence is pronounced, that Person is not to be tried in the Temporal Courts. Is it competent to any Temporal Court? Is it competent to your Lordships, the supreme Temporal Court in the Kingdom? Awful and great as this Court is, give me Leave to say, that the Rules of Construction are the same as in the most inferior Court of Criminal Jurisdiction. There is not one Law for Peers, and another for Commons, in this Country: The Law is the same for both; it only varies in the Circumstances of the Trial: The Evidence to prove the Guilt or Innocence of the Party is the same in all.

There is no Doubt, but the Temporal Courts may try Marriages upon this Act, where no Sentence has been given in the Ecclesiastical Court; as they do every Day upon Titles to Lands on Ejectments: But where a Sentence has been obtained against, or in Favour of, a Marriage in the Ecclesiastical Court, the Temporal Courts are concluded by it.

The concurrent Jurisdiction which they contend for, if I understand them right, is this: The Ecclesiastical Courts, say they, it is true, have a Right to try a Marriage; but the Temporal Courts have also a Right to try a Marriage under this Act of Parliament. The Sentence of the Ecclesiastical Court will not satisfy them; they will have the Evidence; and if they are satisfied with the Evidence that the Ecclesiastical Courts have thought insufficient, they will pronounce the Crime, and punish the Offender. Can there be any such Position warranted by the Act of Parliament?

If the Legislature could have foreseen, that in any Period it should enter into the Head of any Man to set at nothing the Jurisdiction of the Ecclesiastical Courts, they could not in more positive Terms have guarded against it.

If the Gentlemen should be able to establish a concurrent Jurisdiction in the Ecclesiastical and Temporal Courts, they then beg Leave to advance a Step further, and lay down a Rule, which they hope your Lordships will adopt to intitle them to enter into Evidence, that Judgments only bind in Courts of concurrent Jurisdiction, where they are just.

I deny the Rule in the Extent it has been laid down. Have not the Courts of King's Bench, Common Pleas, and Exchequer a concurrent Jurisdiction in Civil Causes? And was it ever heard, when a Judgment of One of the Courts is pleaded in another, that the Propriety and Rectitude of the Judgment can be examined into? Certainly not: The Party is permitted only to deny the Existence of the Judgment. The Case of *Sinclair* and *Frazier*, lately determined by your Lordships upon an Appeal from *Scotland*, was cited as an Authority for this Purpose; in which your Lordships ruled, that a Judgment in the Court of *Jamaica* should not be enforced, unless it was just: That is, if the Defendant in the Cause could shew it was unjust, no Court ought to lend its Aid to carry it into Execution.—My Lords, nothing is more right or just; but does it apply to the Case before your Lordships?

Wherever



Wherever the Aid of a superior Court is wanted to give Effect to a Judgment of an inferior Court, or of a Court which cannot carry into Execution its own Judgments, from the Parties being locally out of its Jurisdiction, that Court whose Aid is prayed ought not to give it, if the Defendant can shew the Judgment to be unjust;—they will give so much Credit to the Sentence of every Court as to presume it right, unless the Defendant can shew the Contrary. Not long ago an Application was made to the Court of King's Bench to enforce the Judgment of the Justices at the Quarter Sessions in *Lancashire*. An Act of Parliament passed for the Inclosure of a Common: By that Act, as the publick Roads are directed to be Sixty Feet wide, the Common was small, situate in a very remote Part of the Country, where very few People came but those interested in the Lands, and they thought that Roads of less Breadth would very well suffice for the Occasions of the Country; the Commissioners under that Act of Parliament assigned in the Name of private Roads, what in Truth had before been publick, and allotted Half the Dimensions required by the Act. There was an Application to the Sessions, who had Jurisdiction, by Appeal; and they ordered the Roads to be opened to the Extent the Act directed: But when they had done that, they were left without the Power of enforcing their Order: They could not compel a specifick Execution of it. If they had proceeded for a Contempt against the Commissioners by Indictment, that would have been tedious and uncertain: the proper Method was by an Application to the supreme Criminal Court of the Kingdom, in which the Super-intendance of all inferior Jurisdictions is lodged. A Mandamus was moved for in the King's Bench to enforce the Judgment of the Sessions. The Court of King's Bench told those who opposed the Application, We think ourselves bound to enforce it, unless you can shew it to be unjust; convince the Court that the Sessions have done wrong, and we will not lend our Aid: And on that Occasion a Case was cited by the learned Lord at the Head of the Court, which happened in the Time of Lord *Hardwicke*; upon a Decree of the Court of Grand Sessions of *Wales*, where a Party had removed out of the Jurisdiction of that Court, a Bill was filed in the Court of Chancery to enforce the Decree of the Grand Sessions; the Defendant by his Answer insisted, that the Decree was unjust, and ought not to be carried into Execution: Lord *Hardwicke* was of Opinion, that if the Defendant could satisfy him that the Decree was unjust, he would not lend his Aid to enforce it.

Do we apply to your Lordships for the Aid of the Court to carry the present Sentence into Execution? No; we ask no Favour; we demand nothing but your Justice: We produce the Sentence: We do not ask for your Assistance to carry it into Execution; it comes in collaterally; and in such Cases, whether in the Courts of Law or in the Courts of Equity, the Sentences of the Ecclesiastical Court have been constantly attended to and been received as conclusive Evidence.

But, my Lords, though Sentences of the Ecclesiastical Courts have been ever received as conclusive Evidence in Civil Causes, yet it is contended, they are not admissible in Criminal Prosecutions. Is it the Genius of this Country to attend more to the Punishment of Crimes, than to the Administration of Justice between the Parties in Civil Rights? Is the Distinction founded in good Sense or sound Policy, that the Sentences of Ecclesiastical Courts should not only be received, but be conclusive, in one Case, and be no Evidence at all in the other? Your Lordships will expect very strong Authorities before you listen to such a Distinction.

Suppose in a Criminal Prosecution the Property of Goods should come in Question, and a Sentence of Condemnation in the Court of Exchequer was produced, is there a Doubt of its being received? Where the Proceeding is *in Rem*, the Sentence must of Necessity be admissible and conclusive in all Courts, between all Parties, and on all Occasions, and to all Intents and Purposes. Without it there would be Contrariety of Determinations upon the same Question; which would be a Reproach to the Justice of the Country.

I troubled your Lordships with a Case from Sir *John Strange's* Reports to prove, that the Sentence of the Ecclesiastical Court was admissible and conclusive in criminal Cases: That Doctrine is abundantly confirmed by a Case in the King's Bench Four Years after; *the King and Rhodes*. What is the Answer given to the Case? The Reporter was a young Man, and therefore he is not to be credited; or his Notes of Cases after his Death came into the Hands of his Executors, who knew nothing of Law, who publish every Scrap of Paper they can find, and give them to the World—to make a Volume; so the Authority is got rid of by an Objection to the Youth of the Reporter, and the Manner of the Publication.

If your Lordships were inclined to listen to Objections of this Kind, it would be a curious Enquiry, at what Period of a Lawyer's Life he can take a Note fit to be reported. I

confess



confess I am totally unacquainted with it. Should it be, when he is at the Bar, a young Man, and attending to every Thing that passés? Should it be, when he is advanced in Business? and when the Business he is concerned in engrosses his Time? If the Case had happened later, your Lordships would have been told, Sir *John* was then a Man of Business; he did not trouble himself about taking Notes; they are very inaccurate. If it had been the Note of a Judge taken upon the Bench, I do not know but it might be said of him, what was said of another Judge; Judges are apt to sleep upon the Bench.

I had the Curiosity to enquire into the Circumstances of the Report: The Case happened when Sir *John Strange* was about Twenty-four or Twenty-five Years of Age; he had been at the Bar Four Years; a Note so taken, and preserved to the Time of his Death, ought not to be slightly treated. The Observation of the Case being published by his Executors would have been spared, had the Gentlemen gone to the First Page of Sir *John Strange's* Book; for they would have found by a Preface written by Sir *John Strange* himself, when between Fifty and Sixty, that he had collected these Cases, and meant the Publick should have the Use of them; that he had been at the Pains of selecting those that he thought fit for Publication, and of putting them into Order. It appears he had given some of his Notes to a Gentleman, whose Servant had clandestinely copied and sold them to Booksellers; and left the Cases so surreptitiously obtained should be imperfectly given to the Publick under the Sanction of his Name, he was at the Expence of having his Notes transcribed under his own Eye; and he says, if they should not be published in my Life-time, they will come perfect into the Hands of my Executors; and of course to the Publick. He practised in the first Criminal Court of this Country with the greatest Honour and Ability; he had never heard in his Time that the Case had been over-ruled or impeached; if he had, his Integrity was such, that the Case never would have appeared in his Book; or, if he had inserted it, it would have been accompanied with a Note, that damned it, or threw a Doubt on its Authority.

There was another Objection to this Case; that it must have been determined in the Time of the dullest Alderman that ever sat in that Court. Who, my Lords, determine Cases of this Kind at the *Old Bailey*? Not the Aldermen: They attend indeed; they are fine Pictures, handsome Furniture; they grace and adorn the Court, very respectable, of considerable Trade; but they do not deal in Law. If they ever study Law, it is to avoid it; in which they are not always successful. The Judges of the Common Law of the superior Courts of *Westminster-hall* decide the Questions, which arise in Trials there.

Your Lordships have been also told, that the Authority of this Case, if ever it had any, was soon put an End to in the Year 1753, in the Case of *the King* and *Murphy*; where the Probate of the Ecclesiastical Court was set at nought; it was nothing more than Paper and Wax, without any Effect: The Case of *the King* and *Murphy* was thrown in by Name: A Case, the *King* and such a one, shews it to have been a Criminal Cause: But it must be from a State of the Facts that your Lordships must discover the Application.

I will let your Lordships know the State of that Case. It was an Indictment for Forging the Will of one *Wilkinson*. Your Lordships have many of you heard of the great Successes of some Privateers fitted out in the Year 1746-7, called *The Royal Family Privateers*; they were very successful; and they got very soon into many Disputes in the Court of Chancery and Courts of Law. Their Wages and Prize-Money were considerable; wicked Men were tempted to endeavour to possess it. A Sailor in a remote Part of the World is a Being not likely to give himself much Trouble about Money: *Murphy*, who was prosecuted at the *Old Bailey*, knowing *Wilkinson's* Title to the Prize-Money, had forged a Will of *Wilkinson*, had got that Will proved, and had received from one *Noades*, the Agent, Part of the Prize-Money of *Wilkinson*: All went off very well; *Murphy* spent the Money; but in a few Months after, Mr. *Wilkinson* was restored to Life; he appeared before the Agent, and demanded his Money: Says the Agent, we have paid your Executor; says he, that is pretty odd; I will satisfy you I have not been dead; and nobody can prove my Will till I am dead; I insist upon my Money. The Fraud was detected; *Murphy* was apprehended, prosecuted, and convicted.

Would the Gentlemen have had him set up the Probate of the Will at the *Old Bailey*? Would they have told *Wilkinson* to go to the Ecclesiastical Court to repeal it? What would *Wilkinson*, ignorant as he was, say? I have heard of Probates of Wills of Dead Men, but never heard of Probates of Wills of Living Men before: The Jurisdiction of the Ecclesiastical Courts is to grant Probates of the Wills of the Dead, not of the Living; and therefore the Question could not arise.

Another



Another Case of one *Stirling* was mentioned: *Stirling* found out, that a Mrs. *Shutter* had Property in the South Sea Stock, and his Scheme to possess it was like *Murphy's*: He forged a Will, got it proved, went to the South Sea House, there he exhibited the Probate; they gave Credit to the Death of the Party, and to his being the Executor, and they paid the Money: The Woman, who had nothing else to live upon, came to receive her Dividend; the Clerk says, your Executor has proved your Will; you must be the Ghost of Mrs. *Shutter*, not Mrs. *Shutter* herself: She was not to be put off in that Way; the Company found out *Stirling*, and brought him to Justice: He did not say to the Court on his Trial, Do not believe her; no Law says you must take the Evidence of a Ghost; she must go into Doctors Commons and rescind this, before you believe her Evidence. No Court would bear such an Insult. The Jurisdiction of the Ecclesiastical Court does not attach, till the Party is dead: There is no such Thing as a Will for the Prerogative Court to give Effect to, whilst the Testator is living. It was said, the Crime consists in obtaining the Probate; the Will has no legal Effect without it: It is not necessary, to constitute the Crime of Forgery, that the Will should be proved; if the Will is exhibited as a genuine Will, and the Officers of the Court (what has happened in many Instances) suspect a Forgery, they stop the Probate; and many have suffered without a Probate being granted, the Offer to prove the Will being a Publication of the Forgery.

Two other Cases, *the King and Fitzgerald*, and *the King and Carr and Richardson*, were also mentioned to your Lordships: In neither of these Cases was any Probate produced or insisted upon by the Prisoner. One of the Gentlemen, who cited the Cases, suggested that Answer to them, which was too obvious to be over-looked.

I trust your Lordships are satisfied, there is no Ground in Reason or Authority for the Distinction attempted between Civil and Criminal Causes in the Admissibility and Effect of the Sentence of the Ecclesiastical Court.

I am now, my Lords, arrived at that Point, to which the whole Artillery seems to be directed; that the Sentence was obtained by Collusion.—Your Lordships have been told, that a Judgment by Collusion is *Fabula, non Judicium*; Wax, Paper, Ink, any Thing that you will, but not a Judgment: The Judge does not act, the Judge is imposed upon; it is of no Effect whatever; in no Court, in no Light, upon no Occasion, can the most ingenious Imagination suggest a Case, in which Collusion does not affect the Transaction; and being once proved, destroys it from the Beginning, and as much annihilates it, as if it had never existed. This your Lordships have been told is the clear settled Law of every Court.

I must beg Leave to deny the Doctrine in the Extent it is contended for, and to insist before your Lordships, that Collusion cannot be averred against this Sentence, either upon the Principles of the Common Law, or the Provisions of any Statute. By the Common Law of this Country, Proof of Collusion in some Instances was permitted to rescind Transactions; the Simplicity of the Common Law, calculated for more honest Times, was not equal to all the Arts of Injustice, which ingenious Wickedness hath produced.

By the Principles of the Common Law, the Person permitted to rescind a Transaction on the Score of Fraud or Collusion must have an Interest vested at the Time. This is expressly laid down by the Court in *Twyne's Case*, reported by Lord Chief Justice *Coke*; where Goods are unjustly taken, and sold in a Market overt by Fraud, to change the Property, the true Owner may retake them;—so where a Creditor prosecutes his Debtor to Judgment, and the Debtor sells his Goods to a Person knowing of the Judgment, with a View to defeat the Execution, the Goods may notwithstanding be taken by the Creditor: In both Cases an Interest was vested at the Time of the Fraud.

Many Statutes have been made to suppress Fraud; in *Henry the IVth's* Time, in the different Reigns of the *Edwards*, and last of all in the Time of Queen *Elizabeth*; the main Object of which was to enable Persons, who became interested subsequent to Transactions founded in Collusion and Fraud, to impeach and rescind them.

It has not indeed been expressly insisted, that by the Common Law, independent of Statuteable Provisions, all fraudulent Judgments were void, and that it was competent to any Person to defeat them: The Authorities I have cited, and legislative Declarations upon the Subject, prove the contrary. The Statute of 9th *Henry VIth*, C. 11. has already been mentioned; from thence it is clear, the Certificate of the Bishop, however collusively or fraudulently obtained, was conclusive between the Parties; and in the Case of Bastardy, a Provision is made against such Certificates in future: But in other Cases, as in Marriage, to this Day, and also before the Reformation upon the Parties being of a Religious Order, the Certificate was conclusive, notwithstanding any Fraud or Collusion.—Collusive Judgments upon penal Statutes to protect Offenders frequently occur in Practice; and when they are insisted on, the Plaintiff has a Right to aver such Judgments to have been obtained



by Fraud and Collusion. This does not arise from the Provision of the Common Law, but from an Act of Parliament made in the 4th H. VII. C. 20. The whole Statute is material to be attended to. The Title of the Act is, "Actions popular prosecuted by Collusion shall be no Bar to those which be pursued with good Faith." It recites, that if an Action popular be commenced against an Offender by good Faith, then the same Offender will delay the Action either by Non-appearance or by Traverse; and hanging the same Action, the same Offender will cause like Action popular to be brought against him by Covin for the same Cause and Offence that the First Action was sued; and then by Covin of the Plaintiff in that Second Action he will be condemned either by Confession, feigned Trial, or Release; which Condemnation and Release so had by Collusion and Covin pleaded by the said Offender shall bar the Plaintiff in the Action sued in good Faith: It is therefore enacted, That in future the Plaintiff suing in good Faith may aver the former Recovery to have been by Covin and Collusion; but no such Averment is to be received after a Trial on the Point of the Action, or on the Covin, or Collusion.

Here your Lordships find the Origin of Averments, that Judgments on Penal Statutes were obtained by Collusion. This Act affirms the Principle of the Common Law, that none but Persons interested were intitled to rescind Judgments on the Ground of Collusion. A Penalty given to a common Informer is not vested in any Individual, till he commences the Action; and consequently he could not aver Collusion in a former Judgment: Such Judgment was not then *Fabula*, or waste Parchment, but of such Effect and Conclusion as called for an Act of Parliament to remedy the Mischief.

There can be no greater Authority to prove the Common Law of the Land, than a Parliamentary Declaration upon the Subject; this Act furnishes a most explicit and satisfactory one. Your Lordships will not suppose an Act was made to remedy a Mischief, or supply a Defect, which did not exist. If your Lordships refer to the Acts of those Days, you will find them drawn with great Precision and Accuracy, and with great Knowledge of the Subject: I will not say so much for the Acts of the present Time.

This Act must evince to your Lordships, that collusive Judgments in Courts of Law bound in collateral Suits. Is it then to be wondered at, that there was no Provision by the Common Law respecting fraudulent Sentences in the Ecclesiastical Courts, which had the sole and exclusive Jurisdiction in themselves? But it does not follow, that collusive Practices are to have Effect, or the Parties go unpunished.

A Power is incident to every Court to prevent its Proceedings from being made the Instruments of Fraud and Iniquity, and to punish the Persons concerned in the Attempt. It may be done upon the Information of any One, interested or not interested. The Court is called upon for its own Honour to examine into the Business.

Your Lordships have been told, that the Crown cannot get at the Collusion; that the Ecclesiastical Courts will not attend to the Application of the Crown: If that were the Case, it would not follow as a necessary Consequence, that the Crown should be admitted to allege Collusion here. But has the Attorney General furnished to the Ecclesiastical Court, that there has been such an Imposition put upon them as is insinuated? Has the Judge of the Ecclesiastical Court told the Attorney General, I cannot attend to the Suggestion? No Application has been made to the Ecclesiastical Court, either on the Part of the Crown, or by the real Prosecutor in this Case, or any other Person, though the Duke of *Kingston* and the noble Lady at the Bar lived together Five Years under the Sanction of a Marriage solemnized with the Archbishop's Licence, in the Presence of Friends, and known to the World. Does the Prosecutor say, he is actuated by Motives of Justice, and allege the supposed Collusion newly discovered?

A Case happened in the Court of King's Bench, which is known to many of your Lordships. Mrs. *Phillips* had married Mr. *Muilman*—Mr. *Muilman* had got rid of that Marriage by a Sentence in the Ecclesiastical Court, by proving a former Marriage with One *Delafield*.—It was then the Lady's Turn; she meditates getting rid of *Delafield's* Marriage, by proving that *Delafield* at the Time he married her had another Wife; and so the Lady was to fix herself upon Mr. *Muilman* in order to give Effect to her Scheme. An Action was brought for a Real Demand against her in the Court of King's-Bench by a Brewer, who had got a Note from her for a valuable Consideration: The Intent of this was to create a Rumour, that *Muilman* and she were married. They might have brought this and a thousand such Actions, and no Verdict given could be Evidence against Mr. *Muilman*; but when Mr. *Muilman* heard of this Proceeding, and the Purpose of it, though it could not affect him, he applied to the Court of King's-Bench, not as a Party in the Cause, but informed the Court that such a Proceeding was had by Collusion, that it was an Abuse of the Court, and ought to be rectified. Lord *Hardwicke* was then at the Head of that Court;

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he considered it as a high Contempt of that Court; he attended to the Application of *Muilman*. An Objection had been made by Counsel, that *Muilman* was not to be heard; What! said Lord *Hardwicke*, to inform the Court of a Contempt is he not to be heard? Any Person as *Amicus Curiae* may inform the Court of a Contempt that has been committed. The Court ordered the Record to be taken off the File, and punished the Parties. If the present Sentence was by Collusion, the Ecclesiastical Court would erase from their Records the Memorial of the Transaction at the Surmise of an *Amicus Curiae*; and would not the Ecclesiastical Court have thought themselves honoured with such an *Amicus Curiae* as his Majesty's Attorney General?

Great, and perhaps deserved, Commendation was bestowed upon the Marriage Act, though, I really confess, I did not discover the Application. Your Lordships were told, that every Woman of easy Virtue and of indigent Circumstances before that Act had an immediate Receipt for the Payment of her Debts by getting married at the *Fleet*. Has the Marriage Act been attended with such beneficial Consequences to make all Women virtuous, and all Women rich? If that be true, it has much greater Merit than I conceived belonged to it. Did a *Fleet* Marriage discharge the Woman from her Debts? The only Change it made in her Situation was this; when married she goes to Gaol in Company with her Husband, whereas if single she must go alone, and trust to the Company she meets there: And as to future Debts she was not liable, because she was a married Woman; and at that Time the Marriage Ceremony, if performed by a Priest, was valid. But is there any Thing in the Marriage Act, which says, that a Woman who now marries shall not run into Debt? It would be very happy for many Husbands in this Country, if there could have been an effectual Provision of that Kind. Before the Marriage Act a Woman by her Marriage in the *Fleet* was not liable to future Debts; a Woman now by her Marriage in the Church is not liable to future Debts. Has the Marriage Act made it a difficult Matter in this Country to be married? Are there many Obstacles in the Way? Is there any Delicacy in Surrogates in granting Licences? In Truth, it is as easy to get married in a Church as before in the *Fleet*. Suppose a Marriage by Banns at a Distance from *London*; the Woman comes here and runs in Debt; does any Body in *London* know of her Marriage, though it was in a Church? She has as much Power to run in Debt since the Marriage Act as before, and as exempt from the Payment.

Your Lordships are told, that a Man and Woman may to Civil Purposes and to Civil Duties, by a collusive Sentence of this Kind, become separated, and no longer Husband and Wife; but to all the Public Duties they are Husband and Wife: They cannot absolve themselves from Publick Duties; there is no Power upon Earth can do it but the Legislature of the Kingdom; and that the noble Lady at the Bar is free to all Civil Purposes, but to all Criminal Purposes she is a Wife.

I wish the Gentleman, who used this Argument, had explained himself upon the Subject; for I protest to your Lordships, I am to be informed that there are other Public Duties by Husband and Wife to be performed, but those in a State of Cohabitation: I have no Idea of any Publick Duties which the State can exact from a Husband and Wife in any other Situation; and yet, my Lords, nothing is more clear, than if a Man and Woman cohabit together as Husband and Wife after a Sentence, like the present, and whilst it remains in force, they are punishable by Ecclesiastical Censures.

Are the Publick Duties alluded to the Injunctions found in the Act of Parliament, that no Man shall take another Wife, or any Woman another Husband, living the former? The Act does not mean to punish all such Acts; for in the first Place the Act says, that it is competent to any Man, without becoming a Felon or the Object of Punishment by the Act, to marry a Second Wife, provided his First Wife is beyond the Seas for Seven Years together, though the Husband knows she is living; and yet the Second Marriage is void, and the Husband may be punished in the Ecclesiastical Courts, but not in the Temporal.

Suppose a Gentleman from *Ireland*, for Instance, should be civil enough to leave his Wife, and resides Seven Years in *England*; though he hears from her by every Packet, though he writes to her by every Packet, he may marry a Woman in *England* without offending against the Act of Parliament. It would be the same, if a Person living at *Dover* could prevail on his Wife to go and reside at *Calais* for Seven Years, he might marry another Woman at *Dover* without any Peril from this Law, though every Vessel brought him Accounts of her good Health. Is this then that great Public Duty, which the State so rigorously exacts, that none of its Subjects shall marry a Second Husband or Wife, living the First?

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It is well known, that a Divorce for Adultery does not dissolve the Bonds of Matrimony ; the Relation of Husband and Wife still exists, and neither Party can marry again ; and yet the Day after that Divorce is pronounced, she can marry any Man she pleases without offending against this Law. It is not then in this Act of Parliament we are to find the Publick Duties which the State exacts from a Husband and Wife ; for in many Cases a Second Marriage is not punished, or even condemned by it.

Possibly the Gentleman may urge, that a Wife's residing Abroad for Seven Years may be by Collusion to give the Husband an Opportunity of marrying again without committing Felony : In short, if your Lordships yield to this Objection of Collusion, it is impossible to foresee to what extravagant Lengths you may be carried in Support of the Proposition, that the noble Lady at the Bar is to all Civil Purposes single, but to all Criminal Purposes a Wife. The Case of a Person who committed a fraudulent Act of Bankruptcy, on which a Commission issued, and for a Concealment of Part of his Effects he was tried and executed, has been mentioned : The Case, so far from maintaining the Proposition, is an Authority against it : The collusive Act of Bankruptcy was deemed equivalent to a real one ; it bound the Bankrupt to all Civil and Criminal Purposes ; it subjected his Property to be seized for the Benefit of his Creditors ; it subjected his Person to the Punishment ordained by the Bankrupt Laws ; there is no Distinction made between Civil and Criminal Purposes.

Suppose a Commission of Bankruptcy issuing fairly upon a Real Act of Bankruptcy, and a Concealment by the Bankrupt ; and let me suppose farther, which is not an impossible Thing, that the Commission by Collusion between the Assignees and the Bankrupt is superseded, as having improperly issued, by an Order of my Lord Chancellor, and an Indictment should be afterwards preferred for the Concealment, would any Judge suffer a Man to be tried as a Felon under these Circumstances on a Suggestion of Fraud in superseding the Commission ? Certainly not : I am persuaded every Judge, who now assists your Lordships, would tell the Prosecutor he had mistaken the Place to examine the Fraud ; that he ought to have applied to the Court of Chancery, which has exclusive Jurisdiction in Bankruptcy ; and direct the Prisoner to be acquitted.

*Fermor's Case*, in Lord *Coke's* Reports, was cited to your Lordships to prove, that Acts Temporal and Ecclesiastical may be avoided for Collusion : Does that learned Judge say, where such Acts are to be avoided ? No ; but, my Lords, to illustrate that Passage he refers to a Case reported in Lord Chief Justice *Dyer's* Reports ; and there it appears, that the Act of the Ecclesiastical Court, which was granting an Administration, had been repealed in the Ecclesiastical Court for Collusion. If I wanted Authorities to add to those I have cited, I would borrow this to put into the Number ; because it is a direct Proof, that the Ecclesiastical Court have a Power to set aside their own Acts for Fraud.

A Case of *Lloyd and Maddox* was cited from *Moore's* Reports to prove, that the Ecclesiastical Courts had a Power to examine into the collusive Means of obtaining a Judgment in the Temporal Courts ; and shall not, say the Gentlemen, the Temporal Courts take the same Liberty with the Sentences of the Ecclesiastical ? The Case need only to be stated to shew the Fallacy of the Argument. A Person claiming a Legacy sues in the Ecclesiastical Court, the proper Forum for the Recovery of that Demand : The Defendant in Answer says, I have nothing to pay you with ; such a one, a Daughter of the Testator, has sued me in a Court of Law for a Debt ; has recovered a Judgment against me ; I must pay that Debt ; I cannot pay your Legacy, unless I pay it out of my own Pocket, and nothing can be more unjust. The Executor is to administer the Effects as far as they go, but not to pay the Debts out of his own Pocket. The Legatee in Answer said, the Judgment was by Fraud, and the Temporal Court would not prohibit the Ecclesiastical from examining into the Matter. This is not only within the Principle of the Common Law, the Legatee having an Interest at the Time of the Fraud committed, but falls within the Statute of Queen *Elizabeth*, which ordains, that every Judgment in any Temporal Court by Collusion is utterly null and void, as if it had never existed ; it is void against every Person having an Interest ; it is void by force of the Statute against the Crown demanding a Forfeiture.

A learned Friend of mine, who spoke in the Cause, and who did me the singular Honor of attending to me, not for what I said, but for what I omitted, observed to your Lordships, that I had avoided entering into the Effect of Fraud and Collusion upon the Sentence, unless by citing the Case of *Hatfield* and *Hatfield*. I knew it would fall to my Share to trouble your Lordships upon that Subject ; and to avoid a Repetition, I contented myself in that Stage of the Business with relying upon the Case of *Hatfield* and *Hatfield*, which appeared to me alone sufficient to answer every Argument upon Collusion.



It is pretty singular, that as *Hatfield* and *Hatfield* was a Case in Equity, and Two of the most eminent Equity Counsel in this Kingdom appear for the Prosecution, that neither of them thought fit to grapple with that Case; they found in the Principles of the Court of Equity, that it was not to be answered, and therefore prudently passed it over to those who should think fit to engage with it. A Woman claimed Forty Pounds a Year, which was vested in a Trustee for her Use; but there was another Devise of an Annuity of Ten Pounds a Year out of Lands, and a Legacy directly given her. The former Husband released to the Heir at Law of the Second Husband, who had made these Provisions for his supposed Wife; she files her Bill; the First Husband in his Answer states all the Circumstances of their Marriage, the Time, the Place, the Minister, and the Persons present, to avoid the Effect of the Release. A Suit of Jactitation is instituted in the Ecclesiastical Court by Collusion with the Second Husband, after Proof of the Marriage in the Cause in the Exchequer, and she is declared a separate Woman, and the Widow of the Deceased; the Court of Exchequer received the Sentence as conclusive Evidence: On an Appeal to the House of Lords the Decree is affirmed.

If it had stood merely upon the printed Cases in the House of Lords, I should conceive your Lordships could not have entertained a Doubt; but the Case is mentioned in Sir *John Strange's* Reports, when he was not a young Man; and the Ground of the Determination is stated to be, that the Sentence was conclusive. The Case is mentioned also by Mr. *Viner* in his Abridgment; where he adds, that the House of Lords held, that a Sentence in the Ecclesiastical Court could not be impeached, though the Proceedings were faint and by Collusion. This clear and direct Authority is to be got rid of, and avoided in this Manner: Mr. *Viner* is a nonsensical Writer; you are not to give Credit to what he says. I should have hoped that Gratitude to Mr. *Viner's* Memory would have repressed that Observation: He has shortened the Hours of the Labour of Lawyers, and more particularly of those who are in great Business. But to Cases in themselves irrefragable, with Decisions upon the very Point, Answers cannot be given by Argument; unless your Lordships will dignify those Observations with the Name of Argument.

The Case of Lady *Mayo* was cited from Doctor's Commons, which is very material to the Cause now before your Lordships. It was a Case of Fraud and Collusion, discovered in the Prerogative Court upon the Appeal, which had been practised in the Consistory Court of the Bishop of *London*: The Fraud was apparent; he that ran might read it: But what said the Judge of the Prerogative Court? You must go into the Consistory Court, where the Fraud was committed; I can give you no Relief. There the Collusion must be gone into, there Redress may be had, there the Honour of the Court will be vindicated. This is the Opinion of a living Judge of high Character for his Abilities and Integrity; a greater Man perhaps never sat at the Head of that Court.

Your Lordships have been pressed to give a more favourable Attention to the Wishes of the Prosecutor, as the present is a Criminal Proceeding. Is it the Principle or Genius of this Country to be more active to find out and punish Crimes, than to give Effect to Civil Rights?

My Lords, There is a Benignity in the Laws of this Country to the Frailties of Mankind; the Judges are attentive and zealous, that the Civil Justice of the Country be strictly administered, and will not suffer any Contrivance, Chicane, Accident, or Neglect to defeat it; but in Criminal Prosecutions they are humane, they make great Allowances, and are not over anxious to discover Criminals. This Observation is verified by daily Practice. In a Civil Cause, if the Trial comes on before the Plaintiff expects it, if a Witness be out of the Way, if the Verdict be in Favour of a Defendant contrary to the Evidence, the Verdict is set aside, and a new Trial ordered and Justice done: But in a Criminal Prosecution, if the Verdict be in Favour of the Defendant, though it arises from the Absence of a Witness, or from any other Accident, or it be given contrary to the clearest and most satisfactory Proof of Guilt, though not One of the Jury can shew his Face without a Blush, yet the Verdict stands, and a new Trial is never granted; it was even denied in Perjury committed in the Time of King *William*, where the Defendants had the Wickedness to corrupt the Witnesses for the Prosecution to keep out of the Way; for whenever, and by whatever Means, there is an Acquittal in a Criminal Prosecution, the Scene is closed and the Curtain drops.

I cannot, my Lords, sit down without reminding your Lordships, that in the Course of the Argument have been cited many Determinations in the Temporal Courts by Judges who had no Partiality to the Ecclesiastical Jurisdiction, acknowledging their Authority, and declaring *unâ Voce*, that in all Cases, where they have an exclusive Jurisdiction, the Sentence is final and conclusive: There is not an Exception to be found in the Books. Some of these



Declarations were made, when the Judges of the Temporal Courts were exceedingly jealous of the Ecclesiastical, and when they were even in a State of Warfare.

Does the present Case call upon your Lordships to break down the Boundaries, which the Constitution has fixed between the Temporal and Ecclesiastical Courts, or to invade those Rules of Decision which have been transmitted from the earliest of Times? Is there an Authority to warrant your Lordships in taking so extraordinary a Step?

Is it expected, that your Lordships are to be more jealous in finding out Crimes and punishing Offenders than your Ancestors? and to accomplish those Purposes, that you will disregard the Authorities of the Law, the Practice of Ages, and the Spirit of the *English* Constitution?

If the Matter, instead of being clear in Favour of the noble Lady at the Bar, as I conceive it to be, had been only doubtful, I am persuaded your Lordships would pronounce an Acquittal.

It is the Duty and Practice of every Judge in a Criminal Prosecution to let the Jury know, that if there hangs a Doubt in the Cause, they ought to give the Turn of the Scale in Favour of Innocence, and acquit the Prisoner.

Can your Lordships after an Argument of Three Days, in which so many respectable Determinations in Favour of the Ecclesiastical Jurisdiction have been cited, lay your Hands upon your Breasts and say, here is no Doubt; the Sentence of the Ecclesiastical Court, upon the Faith of which and by the Advice of a Person of the First Knowledge and Abilities in the Ecclesiastical Law the noble Lady acted, is a Nullity and of no Avail; and that she has intentionally violated the Laws of her Country and become a Felon?

My Lords, I will not permit myself to suspect any One of your Lordships can entertain such an Opinion; and I sit down with the most perfect Confidence, that by your Lordships Judgment the noble Lady at the Bar will be dismissed from any farther Attendance upon your Lordships.

*Lord High Steward.* A noble Lord asks, Whether in that Case you cited, where an Action was brought against Mr. *Thomas Hervey*, the Court upon hearing the Sentence in the Ecclesiastical Court refused to proceed farther in it; or whether it was, that the Cause was then depending in the Ecclesiastical Court?

*Mr. Wallace,* I will give your Lordships an Account from my Memory, confirmed by a Note taken in a subsequent Cause; and if there is any Doubt upon the Facts, I am happy to acquaint your Lordships, that you will have much better Information upon the Subject from the noble Judge who tried the Cause. Mr. *Hervey* and the Lady had lived separate several Years, during which Time a Creditor, who had furnished her with Necessaries, brought an Action against Mr. *Hervey*; he denied his Marriage; there had not been a Sentence at that Time in the Ecclesiastical Court; the Jury were satisfied with the Evidence of the Marriage, and found a Verdict against Mr. *Hervey*.—Another Creditor, who had furnished Necessaries for the Lady afterwards, brought his Action against Mr. *Hervey*, and was provided with the same Evidence which had satisfied the former Jury; but between the Time of the former Trial and the Trial of this Cause a Suit of Jactitation had been instituted in the Ecclesiastical Court by Mr. *Hervey* against the Lady, and a Sentence pronounced in his Favour, which was offered in Evidence: The learned Judge conceived himself bound by that Sentence, as the Judgment of a Court of competent Jurisdiction: There was no Imposition upon the Creditor, no Occasion for an Alarm by the Decision, the Debt was not contracted during Cohabitation, no Act of Mr. *Hervey's* had induced the Creditor to furnish the Necessaries to her as his Wife, he renounced the Relation; the Plaintiff gave Credit upon the Marriage itself, and therefore took upon him to satisfy the Court that there was a legal Marriage: The Sentence of the Ecclesiastical Court had determined the Point; the Judge apprehended that the Question was closed, and that he was bound to give Faith and Credit to the Sentence; and the Plaintiff failed on Account of the Sentence, though it was afterwards reversed upon an Appeal.

*Doctor Calvert.*

My Lords, The Question arising upon the Sentence which has taken up so much of your Lordships Time, seems now confined to a narrower Compass than we at first apprehended.

My Lords, When the Counsel for the noble Dukes at your Lordships Bar offered the Sentence in the Ecclesiastical Court to be read as conclusive Evidence, it was desired by  
the



the Counsel on the other Side, that the Rest of the Proceedings in that Cause might likewise be read. This raised a Belief in us, that Exception would be taken to the Nature of this Sentence in particular, as differing from Sentences in other Matrimonial Causes.

My Lords, We apprehended it would be said, as indeed it was by some of the Counsel on the other Side, that a Proceeding in a Cause of Jactitation, when the Issue of it was, pronouncing for the Jactitation, and the Defendant enjoined Silence (let the Proceeding in that Cause have been what it might) would not amount to a positive Decree against a Marriage, but it would be merely a Dismission of the Party; that it would amount to no more than this, that nothing had been proved for the present, and that the Judgment never would become decretal.

My Lords, I take it to be a mere Mistake, to speak of Proceedings in such a Cause in that Way; but however, we have it now, as I understand, in Concession from the Counsel on the other Side, and we are perfectly agreed about the Nature of the Sentence: It has been allowed, it is as complete a Sentence against a Marriage, as if it had been pronounced in a Cause of Nullity of Marriage.

My Lords, A Concession of this Sort coming from the Counsel on the other Side, your Lordships will see, must leave them much embarrassed; first, by their own Concessions of the Effects similar Judgments have had in other Questions; and likewise by the Act of Parliament, upon which alone this Prosecution can be founded.

My Lords, It is conceded, that some Judgments of the Ecclesiastical Courts are final as to Matrimony; but if they concede that some are, there is now remaining no Objection to this in particular. Your Lordships will see how much this is supported by the Statute, on which the Prosecution is founded; because the Exceptions out of that Statute go directly to those Sentences, with which it is now allowed this is upon a Footing. Can it therefore with any Propriety be now urged, that it ought not to be received as conclusive, because there is a Possibility of setting it aside? This seemed astonishing to the learned Gentleman, who spoke first on the other Side; that, as it is allowed that the Court who passed that Sentence could at any Time upon proper Evidence reverse it, it should be urged in this Judicature as conclusive upon your Lordships. Many Instances have been given, where Sentences not more final or irrevocable than this have been allowed in the Common Law Courts. If in a Cause of Nullity a Marriage be pronounced to be void, it would not be contended a Moment, but that such a Sentence is within the Exception of the Act; and no Person marrying again after such a Sentence could be an Object of Punishment under that Act. It is surely therefore a very considerable Concession, and sufficient to justify the Reliance we have upon it, that it is a positive and direct Sentence against the Marriage.

My Lords, The Ground of some of the Exceptions out of the Act of Parliament seems to be the Notoriety of the State of the Party, which leaves no Room for Imposition on the Person with whom the Second Marriage is contracted; for the Act has not in View merely the Punishment of the Offence as against Morality, because the Exceptions are such which allow in many Cases a Second Marriage, though the First is really in force. The Object therefore of the Act of Parliament seems to be this, that there should be no Deceit put upon the Person; it is expressed by the Preamble in these Words: "Whereas many Persons going from one County to another, or into Places where they are not known, marry again; therefore be it enacted:" But when there has been any Proceeding of this Sort, when there has been any Question litigated in the Ecclesiastical Court relative to that Marriage, and when the Sentence of the Court is against that Marriage, I believe it is no Strain of the Interpretation of that Act, to suppose it is one of those Cases, in which no Prosecution of this Sort ought to be carried on.

My Lords, The Variety of Instances that have been produced to shew, that whenever any Sentence of this Sort has been produced, it has been constantly attended to by all Civil Jurisdictions, will not bear a Contradiction; nothing can be more clear. To all the Cases that have been quoted on our Side, I do not apprehend that any Answer has been given to affect their Authority; what is more, there has been no Case cited on the other Side: Therefore, if a Series of Authorities will establish any Point, it is to be conceded, that in all Civil Cases a Sentence thus pronounced by a Court having a competent Jurisdiction, where the Question has come before that Court, Marriage or not Marriage, will be received: the Question then will come to this; If it can be established, that in Civil Suits it would be received, ought it not to have the same Effect, in a Criminal Prosecution?

My Lords, For that Purpose there have been Cases cited to your Lordships; that of *the King* against *Vincent*, where there was a Prosecution for a Forgery, and the Probate was received as conclusive Evidence against that Forgery.



My Lords, In answer to that it was urged only, that it was a Case that was too strong, and they could not give Credit to the Reporter. That Answer seems by no Means satisfactory, especially as it does not meet with Support from any subsequent Authority, since none has been quoted that comes up to the Point. Two or Three Cases have been mentioned; but when they are considered, and the Circumstances they were attended with, your Lordships will find, it does not appear that they come up to the Case in Question. In Two of these Instances the supposed Testators were living. My Lords, It was a gross Imposition, and the whole Proceeding a mere Mistake, and nothing more. The Testator came into Court to give Evidence: To be sure a Probate under these Circumstances could not be attended to; it could not be a Probate at all; nor could it be contended, that the Probate of the Will of a living Person could be received in Evidence. I know the Treatment it received in the Court of Prerogative in that Case, where *Stirling* was executed for a Forgery. I enquired, to see how that stands, and I do not find there were any Proceedings to reverse or revoke the Probate; the Thing was too absurd to require a judicial Disquisition. I was informed, a Pen was drawn through the Probate, and on the Margin was written the Word *void*. There were Two other Cases mentioned of Indictments for forging Wills, where it was said, that there was a Probate existing; but it does not appear throughout these Cases, that any Mention was made of the Probate at the Trial; or that the Exception was taken for the Prisoners. We pointed out to your Lordships the great Inconvenience that would arise from going on to enquire into Questions of this Sort in Two different Judicatures. It was asserted—

*A Lord.* Whether the Scratch with a Pen through the Probate in the Case of *Stirling* was done by any Order of the Court?

*Doctor Calvert.* Not by any judicial Order, I believe. I apprehend it never came judicially before the Court: By whom it was done I know not. I am not acquainted with that.

My Lords, It was asserted by the Counsel on the other Side, that no Decision of a Civil Nature could be applied to any Criminal Question: It was asserted, but I did not find that it was supported by any Principles or Authorities.

My Lords, We, on the other Hand, did submit to your Lordships, that the Inconveniencies arising from such different Enquiries might be extremely great; for if they produce different Judgments upon the same Point, the Persons, who should be affected and interested under them, under such a Predicament might find it difficult to know what should be their Duty. We pointed out, that in case the Sentence now in Question remains in Force, which I trust it will, notwithstanding any Judgment that may be passed in this Court; yet if you should proceed to censure the Person thus separated from the supposed former Husband, from this Contrariety of Judgments the greatest Confusion would arise; for you would censure the Person for marrying again, as being the Wife of that Husband, of whom it had been directly in Issue and determined that she was never the Wife. This, my Lords, appears to us a very considerable Absurdity. The only Answer I heard to that was rather avowing the Inconvenience than removing it. When it was asked, In what Predicament would a Woman stand under these Circumstances? it was said, she would be a Wife to Criminal Purposes, but not so as to Civil Considerations. What the Distinction meant I confess I do not well understand; but it was said, the noble Lady at the Bar should be considered as a Wife to all Criminal Purposes, because Persons cannot absolve themselves from their public Duties. I never understood, that with regard to Matrimony any Party could absolve himself from his private Duties neither: I always understood it, as far as his own Act could affect it, to be an indelible Obligation. But what are the Duties to the Publick, which a Person in this Situation should be answerable for? A Woman by Law separated from, and even pronounced not to be the Wife of, the supposed Husband, and to whom she cannot return; I do not know what Duties there are, that she should be answerable to the Publick for: It is contended, that of not marrying again; but this is expressly contrary to the Meaning of the Act itself, which provides that in many Cases, even where the former Marriage remains in Force, yet a Second Marriage shall not be Criminal; as in the Case of a Separation *a Mensa et Thoro* there is no Doubt, that the Parties remain Man and Wife as much as if they had never been divorced; nay, it is so merely a temporary Separation, that there is no Occasion for a judicial Proceeding to bring them together again; for whenever the Parties chuse to cohabit, they may live together, and are as completely Man and Wife, as if no Separation had happened. It has been observed, that some Inconveniencies, which were removed by the late Marriage Act, might be introduced again under these Suits of Jactitation: It is certainly somewhat unintelligible how these Suits could be applied to those Purposes. The Grievance mentioned



is this, that single Women contracting Debts did, before that Act of Parliament, procure themselves to be clandestinely married to Persons with whom they never intended to cohabit, but merely with a View fraudulently to protect themselves against their Creditors. Now, can it be argued, that by going into the Ecclesiastical Court, and obtaining a Sentence in a Cause of Jactitation, that End would be answered? What! when a Woman wants a Husband to protect her from her Debts, shall she get herself fraudulently released from her Husband? It seems it would have quite a contrary Effect, and cannot answer the Purpose for which it would be intended. If any of the excellent Regulations made by that Act are in Danger of being infringed upon by undue Practices, it were worthy the Legislature to attend to it, and provide against them; but a Court of Justice cannot for such Reasons depart from ancient and established Modes of Proceedings: And in this Case these Considerations ought not to have the least Weight, because there is not any Ground for the Apprehension. In the Proceedings in this Criminal Court therefore your Lordships ought to receive these Sentences upon the very same Principles, or indeed broader, than a Civil Court; for who shall pretend to say, that in a Civil Question Parties may avail themselves of such a Suit? But where a Person is brought merely to answer for a Crime, and for the Purpose of Punishment, who shall say, that it is consonant to the Principles of Law that such a Defence should not avail? So rigorous a Determination in Criminal Cases has not been supported on any Authority, or established on any Principle. Upon the Authorities therefore which have been quoted, and which remain unshaken and uncontradicted, we do submit to your Lordships, that these Two Points are well established. But it has been said, that we are now arguing for what is not open to be considered on the general Principles of Law; because this Question has been already decided by the very Act upon which the Prosecution is now depending; for when an Act of Parliament makes some Exceptions, the true Interpretation of that Act is, that all Cases, which are not within the Exceptions, are within the Prohibition.

My Lords, Supposing that to be a good Principle of Interpretation, yet it may very well and with Propriety be contended, that the Case that is now offered, I mean the Sentence pronouncing against this Marriage in a Cause of Jactitation, is within the Exceptions of the Act of Parliament.

My Lords, The Two Exceptions are, that it shall not extend to any Person, who is at the Time of such Marriage divorced by any Sentence had in the Ecclesiastical Court; or to any Person, where the former Marriage hath been, or hereafter shall be, by Sentence in any Ecclesiastical Court, decreed to be void and of no Effect.

My Lords, It will be difficult to explain the latter Words, connected with the Provision in the former Clause, without taking in the very Sentence which is now under Consideration. The general Words in the First Clause are, that it shall not extend to those Cases, in which at the Time of such Marriage the Person was divorced by any Sentence of the Ecclesiastical Court.

Now, my Lords, the Word Divorce has always been applied, not only to Separations *a Mensa et Thoro*, but to Divorces *a Vinculo Matrimonii*; the First Clause therefore, under the general Word of Divorce, seems to take in both these Cases, whether it be a temporary Separation for Adultery or Cruelty, or whether it be a Divorce *a Vinculo Matrimonii*. If that Clause applies to these Two Cases, I would ask, what is the Meaning of the Second, that speaks of Sentences declaring a Marriage null and void to all Effects? A Sentence pronouncing a Marriage null, and void, and of no Effect, is the same Thing as a Divorce *a Vinculo Matrimonii*; because if the Marriage has ever been a true and legal Marriage, it is well known, that no judicial Power in this Kingdom can put an End to it. In order therefore to give every Part of this Act some Meaning, it ought to be understood, that the Legislature by those general Words must mean any Sentence whatever, by which the Ecclesiastical Court should have pronounced, that there is no Marriage, or that a Marriage is void; it being the Purport and the general Object of this Act to save not only the Jurisdiction of the Ecclesiastical Court (that is not what I am contending for); but it is to save the Innocence of the Persons acting under such Sentences: Because where that Question has been agitated in a publick Court (for the Legislature does not suppose, as some of the Counsel on the other Side have unwarrantably supposed, it to be a private and clandestine Transaction; but) the Constitution supposes every Court to be open and publick, and Proceedings there to be before the Face of the World; every Body may see and know them, if they please; and when there has been this publick Sentence of any constitutional Court, the Meaning, the Equity of the Act must be, that any One of these Sentences shall justify the Party acting under it. To make a Distinction between a Cause of Nullity and a Cause of Jactitation, I apprehend can be founded upon nothing, but not considering the Nature of the Proceedings;



because I can hardly put a Case, which would be a proper Subject for a Suit of Nullity, but it might likewise be proceeded to the same Effect in a Suit of Jactitation; the only Difference is, the Proof being put upon the different Party. Suppose a Person means to dispute the Validity of his Marriage; he may, if he pleases, proceed in a Cause of Nullity of Marriage; in which Case he must state the Circumstances of his Marriage, and the Prayer of his Libel will be, that under these Circumstances his Marriage may be pronounced void; the Sentence then would be direct to that Point. Suppose, on the other Hand, he chuses to bring a Suit of Jactitation, and charges that the Woman has claimed him to be her Husband: If she justifies that Jactitation by pleading her Marriage, it is incumbent on her then to state the Case, and to go into the Question, whether it is a Marriage or no; and if in that justificatory Plea such Circumstances be stated, as would have been the Contents of the Libel in a Cause of Nullity, the Sentence, I contend, would have precisely the same Effect.

My Lords, I have known more Instances than One to justify what I assert. The First Suit that ever was brought upon the Marriage Act to avoid a Marriage by reason of Minority, where the Party under Age was married by Licence without the Consent of Parents, was by a Suit of Jactitation: It was the Case of *Frost and Waldeck* in 1760. I looked into the Sentence that was pronounced in that Cause, and it was precisely in the same Words as this now in Question. Will any Body contend that it is not an effectual Sentence, declaring the Marriage between these Parties void? Your Lordships see it is a Fallacy therefore to say, that this Method of Proceeding in a Cause of Jactitation will not as effectually bring on the Question of Marriage, as a Cause of Nullity of Marriage. There were Two other Cases afterwards upon that Act, that were brought in the same Way; neither of them came to a Decision, but the Method of Proceeding was the same. Afterwards there was a Suit upon that Act of Parliament brought as a Cause of Nullity of Marriage. I remember it being made a Question, whether even that was a proper Way of Proceeding; but the Judge was of Opinion, that the Party might have proceeded in either Way, conceiving, I presume, that the Sentence in one Way would be as effectual as in the other. With what Propriety then can it be said, as it was on the other Side, that all Proceedings in Causes for Jactitation of Marriage must be with an ill Intent?

My Lords, It doth not apply at all to the Manner of Proceedings. Suppose it to be true, what was asserted by the Counsel, and I believe it is in a great Measure so, that these Suits were chiefly used for the Purpose of enquiring into Contracts of Marriage; for before the Marriage Act put an End to such Contracts, it was difficult for Parties to know, whether they had entered into such Contracts as would bind them or no. With what Propriety can it be said, that if a Suit of Jactitation be brought upon such Contract, it must be with an ill Intent? I have mentioned, that these Suits have been brought under the Marriage Act, and therefore merely upon the Question of Marriage: In those Cases the Sentences are precisely conceived in the same Words with the Sentence in this Cause: And if a Man was to be married again after such a Sentence pronounced, would it be argued one Moment, that he would be guilty of Polygamy under this Statute? If he would not, it must be, because such a Sentence is on the same Footing, as if it had been given in a Cause of Nullity. For, if a Sentence given in a Cause of Nullity was to be offered as conclusive, and before you entered into Evidence upon the Fact, your Lordships would think it the proper Time to offer it, there would be no Occasion to go into the Question; because, let the Fact turn out what it might, that Sentence would be satisfactory, that the Marriage was void, that is, that there was no Marriage then subsisting between the Parties. What is the Assertion often then in a Suit of Jactitation; and what was the Assertion in the Cause now before your Lordships? The Plaintiff to justify his Claim upon the Lady states, that at a particular Time he was married, states the Circumstances, states the Persons present; he attempts to prove this Fact: The Judge having considered the Proofs, and gone into the Question, determined that there was no Marriage, or in other Words, that the Marriage is of none Effect; that is, that the Marriage that is pleaded there can have no Effect; for he pronounces, that, as far as to him appears, the Party is a Spinster, and free from all Matrimonial Contracts. If we are right then in bringing this Cause within the Exceptions of the Act, every Objection I should conceive, that can be stated, is removed under the express Regulation of the Act of Parliament; because the Legislature taking this Matter into their Consideration, well aware, as it must be supposed, of what Inconveniencies might be argued to arise, have still enacted, that these Sentences existing, the Person marrying again shall not be within the Act of Parliament.



Under these Considerations, the Reply having been so fully and so ably gone into by the Gentlemen who went before me, I shall take up your Lordships Time no longer, than in hoping you will be of Opinion, that this Sentence coming within the Exceptions of the Act, it would be improper to go into any Proof of the Fact: And therefore I hope your Lordships will admit of this Plea of the Defendant.

*Lord President of the Counsel.* My Lords, I move your Lordships to adjourn to the Chamber of Parliament.

*Lords.* Ay, Ay.

*Lord High Steward.* This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same Order they came down. The Dukes of *Kingston* retired from the Bar. After some Time passed in the Chamber of Parliament,

( See the Appendix. )

The Lords and others came back from thence in the same Order; and the Peers being seated, and the Lord High Steward in his Chair, the Dukes of *Kingston* was again brought to the Bar.

*Lord High Steward.* Mr. Attorney General, you may go on to state your Charge.

*Mr. Attorney General.*

My Lords, It seems to be Matter of just Surprise, that, before the Commencement of the last Century, no secular Punishment had been provided for a Crime of this malignant Complexion and pernicious Example.

Perhaps, the Innocence of simpler Ages, or the more prevailing Influence of Religion, or the Severity of Ecclesiastical Censures, together with those Calamities which naturally and necessarily follow the Enormity, might formerly have been found sufficient to restrain it.

From the Moment these Causes ceased to produce that Effect, Imagination can scarcely state a Crime, which calls more loudly, and in a greater Variety of Respects, for the Interposition of Civil Authority; which, besides the gross and open Scandal given to Religion, implies more cruel Disappointment to the just and honourable Expectations of the Persons betrayed by it; which tends more to corrupt the Purity of domestick Life, and to loosen those sacred Connections and close Relations, designed by Providence to bind the moral World together; or which may create more civil Disorder, especially in a Country, where the Title to great Honour and high Office is hereditary.

[Here followed a great Uproar behind the Bar, and the Serjeant at Arms made the usual Proclamation.]

My Lords, The Misfortunes of Individuals, the Corruption of private Life, the Confusion of domestick Relations, the Disorder of Civil Succession, and the Offence done to Religion, are suggested, not as Ingredients in the particular Offence now under Trial, but as Miseries likely to arise from the Example of the Crime in general; and are laid before your Lordships, only to call your Attention to the Course and Order of the Trial, that nothing may fall out, which may give Countenance to such a Crime, and heighten such Dangers to the Publick.

The present Case, to state it justly and fairly, is stript of much of this Aggravation. The advanced Age of the Parties, and their previous Habits of Life, would reduce many of these general Articles of Mischief and Criminality to idle Topicks of empty Declamation. No Part of the present Complaint turns upon any Ruin, brought on the blameless Character of injured Innocence; or upon any Disappointment incurred to just and honourable Pretensions; or upon any Corruption supposed to be introduced into domestick Life. Nor should I expect much serious Attention of your Lordships, if I should urge the Danger of intailing an uncertain Condition upon a helpless Offspring, or the Apprehension of a disputed Succession to the House of *Pierrepoint*, as probable Aggravations of this Crime.

But your Lordships will be pleased withal to remember, that every Plea, which, in a Case differently circumstanced, might have laid Claim to your Pity for an unfortunate Passion in younger Minds, is entirely cut off here. If it be true, that the sacred Rights of Matrimony have been violated, I am afraid it must also appear, that dry Lucre was the whole Induce-

ment,



ment, cold Fraud the only Means to perpetrate that Crime. In Truth, the Evidence, if it turns out correspondent to the Expectations I have formed, will clearly and expressly represent it as a Matter of perfect Indifference to the Prisoner, *whicb* Husband she adhered to, so that the Profit to be drawn from *this* Marriage, or from *that*, was tolerably equal. The Crime, stated under these Circumstances, and carrying this Impression, is an Offence to the Law; which, if it be less aggravated in some Particulars, becomes only more odious in others.

But I decline making general Observations upon the Evidence. I will state it to your Lordships (for it lies in a very narrow Compass) in the simplest and shortest Manner I can invent. The Facts (as the State of the Evidence promises me they will be laid before your Lordships) form a Case, which it will be quite impossible to aggravate, and extremely difficult to extenuate.

My Lords, Considering the Length of Time which has intervened, a very few Periods will comprise the Facts, which I am able to lay before your Lordships. *First*, The Marriage of the Prisoner with Mr. *Hervey*; her Cohabitation with him at broken and distant Intervals; the Birth of a Child in consequence of it; the Rupture, and Separation which soon followed. *Secondly*, The Attempt, which the Prisoner, in View to the late Lord *Bristol's* then State of Health, made to establish the Proofs of her Marriage with the present Earl. *Lastly*, The Plan, which makes the immediate Subject of the present Indictment, for bringing about the Celebration of a Second Marriage with the late Duke of *Kingston*.

The Prisoner came to *London* early in Life, some Time, as I take it, about the Year 1740. About Forty-three, she was introduced into the Family of the late Princess of *Wales*, as her Maid of Honour. In the Summer of Forty-four, she contracted an Acquaintance with Mr. *Hervey*; which begins the Matter of the present Indictment. This Acquaintance was contracted by the meer Accident of an Interview at *Winchester* Races. The Familiarity immediately began; and very soon drew to its Conclusion.

Miss *Chudleigh* was about about Eighteen Years of Age; and resided at the House of a Mr. *Merrill*, her Cousin, on a Visit with a Mrs. *Hanmer*, her Aunt, who was also the Sister of Mr. *Merrill's* Mother. One Mr. *Mountenay*, an intimate Friend of Mr. *Merrill's*, was there at the same Time.

Mr. *Hervey* was a Boy about Seventeen Years old, of small Fortune, but the younger Son of a noble Family. He was Lieutenant of the *Cornwall*, which made Part of Sir *John Daver's* Squadron, then lying at *Portsmouth*, and destined for the *West-Indies*. In short, he appeared to Mrs. *Hanmer* an advantageous Match for her Niece.

From *Winchester* Races he was invited to *Lainston*; and carried the Ladies to see his Ship at *Portsmouth*. The *August* following, he made a Second Visit at *Lainston* for Two or Three Days; during which the Marriage was contracted, celebrated, and consummated.

Some Circumstances, which I have already alluded to, and others, which it is immaterial to state particularly, rendered it impossible, or improvident, in a Degree next to impossible, that such a Marriage should be celebrated solemnly, or publicly given out to the World. The Fortune of both was insufficient to maintain them in that Situation, to which his Birth, and her Ambition had Pretensions. The Income of her Place would have failed. And the Displeasure of the noble Family, to which he belonged, rendered it impossible on his Part to avow the Connection. The Consequence was, that they agreed without Hesitation to keep the Marriage secret. It was necessary for that Purpose to celebrate it with the utmost Privacy; and accordingly no other Witnesses were present, but such as had been apprised of the Connection, and were thought necessary to establish the Fact, in case it should ever be disputed.

*Lainston* is a small Parish, the Value of the Living being about Fifteen Pounds a Year; Mr. *Merrill's* the only House in it; and the Parish Church at the End of his Garden. On the 4th of *August* 1744, Mr. *Amis*, the then Rector, was appointed to be at the Church, alone, late at Night. At Eleven o'Clock, Mr. *Hervey* and Miss *Chudleigh* went out, as if to walk in the Garden; followed by Mrs. *Hanmer*, her Servant (whose Maiden Name I forget; she is now called *Ann Cradock*, having married Mr. *Hervey's* Servant of that Name) Mr. *Merrill*, and Mr. *Mountenay*; which last carried a Taper to read the Service by. They found Mr. *Amis* in the Church, according to his Appointment; and there the Service was celebrated, Mr. *Mountenay* holding the Taper in his Hat. The Ceremony being performed, Mrs. *Hanmer's* Maid was dispatched to see that the Coast was clear; and they returned into the House, without being observed by any of the Servants. I mention these small Circumstances, because they happen to be recollected by the Witnesses.



The Marriage was consummated the same Night; and he lay with her Two or Three Nights following; after which he was obliged to return to his Ship, which had received sailing Orders.

Miss *Chudleigh* went back, as had been agreed, to her Station of Maid of Honour in the Family of the Princess Dowager. Mr. *Hervey* sailed in *November* following for the *West-Indies*; and remained there till *August 1746*, when he set Sail for *England*. In the Month of *October* following he landed at *Dover*, and resorted to his Wife, who then lived, by the Name of Miss *Chudleigh*, in *Conduit-street*. She received him as her Husband, and entertained him accordingly, as far as consisted with their Plan of keeping the Marriage secret. In the latter End of *November* in the same Year, Mr. *Hervey* sailed for the *Mediterranean*, and returned in the Month of *January 1747*, and staid here till *May* in the same Year. Mean while she continued to reside in *Conduit-street*, and he to visit her as usual, till some Differences arose between them, which terminated in a downright Quarrel; after which they never saw each other more. He continued abroad till *December 1747*, when he returned; but no Intercourse, which can be traced, passed between them afterwards.

This general Account is all I am able to give your Lordships of the Intercourse between Mr. *Hervey* and his Wife. The Cause of the Displeasure, which separated them, is immaterial to be enlarged upon. The Fruit of their Intercourse was a Son, born at *Chelsea*, some Time in the Year *1747*. The Circumstances of that Birth, the Notice which People took of it, and the Conversations which she held about that, and the Death of the Child, furnish Part of the Evidence, that a Matrimonial Connection actually subsisted between them.

After having mentioned so often the Secrecy, with which the Marriage and Cohabitation were conducted, it seems needless to observe to your Lordships, that the Birth of a Child was suppressed with equal Care. That also made but an awkward Part of the Family and Establishment of a Maid of Honour.

My Lords, That which I call the Second Period, was in the Year *1759*. She had then lived at a Distance from her Husband near Twelve Years. But the infirm State of the late Lord *Bristol's* Health seemed to open the Prospect of a rich Succession, and an Earldom. It was thought worth while, as nothing better had then offered, to be Countess of *Bristol*; and for that Purpose to adjust the Proofs of her Marriage.

Mr. *Amis*, the Minister who had married them, was at *Winchester*, in a declining State of Health. She appointed her Cousin, Mr. *Merrill*, to meet her there on the *12th of February 1759*; and by Six in the Morning she arrived at the *Blue Boar Inn*, opposite Mr. *Amis's* House. She sent for his Wife and communicated her Business, which was to get a Certificate from Mr. *Amis* of her Marriage with Mr. *Hervey*. Mrs. *Amis* invited her to their House, and acquainted her Husband with the Occasion of her coming. He was ill a-bed; and desired her to come up. But nothing was done in the Business of the Certificate, till the Arrival of Mr. *Merrill*, who brought a Sheet of stamped Paper to write it upon. They were still at a Loss about the Form, and sent for one *Spearing* an Attorney. *Spearing* thought, that the merely making a Certificate, and delivering it out in the Manner which had been proposed, was not the best Way of establishing the Evidence which might be wanted. He therefore proposed, that a Check-book (as he called it) should be bought; and the Marriage be registered in the usual Form, and in the Presence of the Prisoner. Some Body suggesting that it had been thought improper she should be present at the making of the Register, he desired she might be called; the Purpose being perfectly fair, merely to state that in the Form of a Register, which many People knew to be true; and which those Persons of Honour, then present, give no Room to doubt. Accordingly his Advice was taken, the Book was bought, and the Marriage was registered. The Book was intitled, *Marriages, Births, and Burials in the Parish of Lainston*. The First Entry ran, *The Twenty-second of August One thousand Seven hundred and Forty-two, buried, Mrs. Susannah Merrill, Relict of John Merrill, Esq.* The next was *the Fourth of August One thousand Seven hundred and Forty-four, married, the Honourable Augustus Hervey, Esq; to Miss Elizabeth Chudleigh, Daughter of Colonel Thomas Chudleigh, late of Chelsea College deceased, in the Parish Church of Lainston, by me Thomas Amis*. The Prisoner was in great Spirits. She thanked Mr. *Amis*; and told him, it might be a hundred thousand Pounds in her Way. She told Mrs. *Amis* all her Secrets; of the Child she had by Mr. *Hervey*; a fine Boy, but it was dead; and how she borrowed a hundred Pounds of her Aunt *Hanger* to make Baby Cloaths. It served the Purpose of the Hour to disclose these Things. She sealed up the Register, and left it with Mrs. *Amis*, in Charge, upon her Husband's Death, to deliver it to Mr. *Merrill*. This happened in a few Weeks after.



Mr. *Kinchin*, the present Rector, succeeded to the Living of *Lainston*; but the Book remained in the Possession of Mr. *Merrill*.

In the Year 1764 Mrs. *Hanner* died, and was buried at *Lainston*. A few Days after, Mr. *Merrill* desired her Burial might be registered. Mr. *Kinchin* did not know of any Register, which belonged to the Parish; but Mr. *Merrill* produced the Book, which Mr. *Amis* had made; and taking it out of the sealed Cover, in which it had remained till that Time, shewed *Kinchin* the Entry of the Marriage, and bade him not mention it. *Kinchin* subjoined the Third Entry, *Buried, December the Tenth, One thousand Seven hundred and Sixty-four, Mrs. Ann Hanmer, Relict of the late Colonel William Hanmer*; and delivered the Book again to Mr. *Merrill*.

In the Year 1767 Mr. *Merrill* died; Mr. *Bathurst*, who married his Daughter, found this Book among his Papers; and taking it to be, what it purported, a Parish Register, delivered it to Mr. *Kinchin* accordingly. He has kept it as such ever since; and upon that Occasion made the Fourth Entry, *Buried, the 7th of February One thousand Seven hundred and Sixty-seven, John Merrill, Esq;*

The Earl of *Bristol* recovered his Health; and this Register was forgotten, till a very different Occasion arose for Enquiry after it.

The Third Period, to which I begged the Attention of your Lordships in the Outset, was in the Year 1768. Nine Years had passed, since her former Hopes of a great Title and Fortune had fallen to the Ground. She had at length formed a Plan to attain the same Object another Way. Mr. *Hervey* also had turned his Thoughts to a more agreeable Connection; and actually entered into a Correspondence with the Prisoner, for the Purpose of setting aside a Marriage so burdensome and hateful to both. The Scheme he proposed was rather indelicate; not that afterwards executed, which could not sustain the Eye of Justice a Moment; but a simpler Method, founded in the Truth of the Case; that of obtaining a Separation by Sentence, *a Mensâ et Thoro propter Adulterium*; which might serve as the Foundation of an Act of Parliament for an absolute Divorce. He sent her a Message to this Effect, in Terms sufficiently peremptory and rough, as your Lordships will hear from the Witness. Mrs. *Cradock*, the Woman I have mentioned before, as being Mrs. *Hanner's* Servant and present at the Marriage, was then married to a Servant of Mr. *Hervey*, and lived in the Prisoner's Family with her Husband. He bade her tell her Mistress, *That he wanted a Divorce; that he should call upon her (Cradock) to prove the Marriage; and that the Prisoner must supply such other Evidence as might be necessary.*

This might have answered his Purpose well enough; but her's required more Reserve and Management; and such a Proceeding might have disappointed it. She therefore spurned at that Part of the Proposal; and refused, in Terms of high Resentment, *to prove herself a Whore*. On the 18th of *August* following she entered a Caveat at Doctors Commons, to hinder any Process passing under Seal of the Court, at the Suit of Mr. *Hervey*, against her, in any Matrimonial Cause, without Notice to her Proctor.

What Difficulties impeded the direct and obvious Plan, or what Inducements prevailed in Favour of so different a Measure, I cannot state to your Lordships. But it has been already seen in a Debate of many Days, what Kind of Plan they substituted in Place of the former.

In the *Michaelmas* Session of the Year 1768, she instituted a Suit of Jactitation of Marriage in the common Form. The Answer was a Cross Libel, claiming the Rights of Marriage. But the Claim was so shaped, and the Evidence so applied, that Success became utterly impracticable.

A grosser Artifice, I believe, was never fabricated. His Libel stated the Marriage, with many of its Particulars; but not *too many*. It was large in alleging all the indifferent *Circumstances* which attended the Courtship, Contract, Marriage Ceremony, Consummation, and Cohabitation; but when it came to the *Facts* themselves, it stated a *secret* Courtship, and a Contract, *with the Privity of Mrs. Hanmer alone*, who was then dead. The Marriage Ceremony, which, in Truth, was celebrated in the Church at *Lainston*, was said to have been performed at *Mr. Merrill's House, in the Parish of Sparshot, by Mr. Amis*, in the Presence of *Mrs. Hanmer* and *Mr. Mountenay*, who were all Three dead. Mrs. *Cradock*, whom but Three Months before he held out as a Witness of the Marriage, was dropped; and, to shut her out more perfectly, the Consummation is said to have passed *without the Privity or Knowledge of any Part of the Family and Servants of Mr. Merrill*; meaning perhaps that *Cradock* was Servant to Mrs. *Hanner*. It was further insinuated, that the Marriage was kept a *Secret, except from the Persons before-mentioned.*



To these Articles the Form of Proceeding obliged her to put in a personal Answer upon Oath. She denies the *previous* Contract; she evades the Proposal of Marriage, by stating that it was *made* to Mrs. *Hanmer* without *her* *Privity*; not denying that it was afterwards *communicated* to her. The rest of the Article, which contains a circumstantial Allegation of the Marriage, together with the Time, Place, Witnesses, and so forth, she buries in the formal Conclusion of every Answer, by *denying the Rest of the said pretended Position, or Article to be true in any Part thereof*. Finally, she demurs to the Article, which alleges Consummation.

Denying the Rest of the Article to be true in *any Part* of it reserves this *Salvo*. The whole Averment of Marriage was but *One Part* of the Article; that Averment (the Language is so constructed) makes but one Member of a Sentence; and yet it combines false Circumstances with true. *They were, in Mr. Merrill's House, at Sparshot, joined together in Holy Matrimony*. This *Part* of the Article, as her Answer calls it, is not true. It is true they were *married*; but not true, that they were married *at Sparshot, or at Mr. Merrill's House*.

How was this gross and palpable Evasion treated? It is the Course of the Ecclesiastical Court to file Exceptions to indistinct or insufficient Answers. Otherwise, to be sure, they could not compel a Defendant to put in any material Answer. But it was not the Purpose of this Suit to exact a sufficient Answer; consequently no Exceptions were filed; but the Parties went to Issue.

The Plan of the Evidence also was framed upon the same measured Line. The Articles had excluded every Part of the Family: Even the Woman, whom Mr. *Hervey* had sent to demand the Divorce, was omitted. But her Husband is produced, to swear, that in the Year 1744 Mr. *Hervey* danced with Miss *Chudleigh* at *Winchester* Races, and visited her at *Lainston*; and in 1746 he heard a Rumour of their Marriage. *Mary Edwards* and *Ann Hillam*, Servants in Mr. *Merrill's* Family, did not contradict the Article they were examined to, which alleges, that none of his Servants knew any Thing of the Matter. But they had heard the Report. So had Messrs. *Robinson*, *Hoffack*, and *Edwards*. Such was the Amount of Mr. *Hervey's* Evidence; in which the Witnesses make a great Shew of Zeal to disclose all they know, with a proper Degree of Caution to explain that they know nothing.

The *Form* of examining Witnesses was also observed on her Part; and she proved, most irrefragably, that she passed as a single Woman; went by her Maiden Name; was Maid of Honour to the Princess Dowager; bought and sold; borrowed Money of Mr. *Drummond*; and kept Cash with him, and other Bankers, by the Name of *Elizabeth Chudleigh*; nay, that Mr. *Merrill*, and Mrs. *Hanmer*, who had agreed to keep the Marriage secret, conversed, and corresponded with her by that Name.

For this Purpose a great Variety of Witnesses was called; whom it would have been every rash to produce, without some foregone Agreement, or perfect Understanding, that they should not be cross-examined. Many of them could not have kept their Secret under that Discussion; even in the imperfect and wretched Manner, in which Cross-Examination is managed upon Paper, and in those Courts. Therefore not a single Interrogatory was filed; nor a single Witness cross examined, though produced to Articles exceedingly confidential, such as might naturally have excited the Curiosity of an adverse Party to have made further Enquiries.

In the Event of this Cause, thus treated, thus pleaded, and thus proved, the Parties had the singular Fortune to catch a Judgment against the Marriage by meer Surprise upon the Justice of the Court.

While I am obliged to complain of this gross Surprise, and to state the very Proceedings in the Cause as pregnant Evidence of their own Collusion, I would not be understood to intend any Reflection on the Integrity or Ability of the learned and respectable Judge.

*For oft, though Wisdom wake, Suspicion Sleeps  
At Wisdom's Gate, and to Simplicity  
Resigns her Charge; while Goodness thinks no Ill,  
Where no Ill seems. ———*

Nor should any Imputation of Blame be extended to those Names, which your Lordships find subscribed to the Pleadings. The Forms of Pleading are Matters of Course. And if they were laid before Counsel, only to be signed, without calling their Attention to the Matter of them, the Collusion would not appear. A Counsel may easily be lead to overlook, what nobody has any Interest or Wish that he should consider.

Thus



Thus was the Way paved to an adulterous Marriage; thus was the Duke of *Kingston* drawn in to believe, that Mr. *Hervey's* Claim to the Prisoner was a false and injurious Pretension; and he gave his unsuspecting Hand to a Woman, who was then, and had for Twenty-five Years, been the Wife of another.

In the vain and idle Conversations, which she held, at least with those who knew her Situation, she could not refrain from boasting how she had surprised the Duke into that Marriage. *Do not you think* (says she with a Smile to Mrs. *Amis*) *do not you think, that it was very kind in his Grace to marry an old Maid?* Mrs. *Amis* was Widow of the Clergyman, who had married her to Mr. *Hervey*, who had assisted her in procuring a Register of that Marriage, and to whom she had told of the Birth of the Child. The Duke's Kindness, as she insultingly called it, was scarcely more strange, than her Manner of representing it to one who knew her real Situation so well.

My Lords, This is the State of the Evidence; which must be given, were it only to satisfy the *Form* of the Trial; but is in *Fact* produced, to prove that, which all the World knows perfectly well, as a Matter of publick Notoriety. The Subject has been much talked of; but never, I believe, with any Manner of Doubt, in any Company at all conversant with the Passages of that Time in this Town. The Witnesses, however, will lay these Facts before your Lordships; after which, I suppose, there can be no Question what Judgment must be pronounced upon them: For your Lordships will hardly view this Act of Parliament just in the Light in which the Prisoner's Counsel have thought fit to represent it, as a Law made for *Beggars*, not for *People of Fashion*. To be sure, the Preamble does not expressly prove the Legislature to have foreseen or expected, that these would be the Crimes of higher Life, or nobler Condition. But the Act is framed to punish the Crime, wherever it might occur; and the impartial Temper of your Justice, my Lords, will not turn aside its Course in respect to a noble Criminal.

Nor does the Guilt of so heinous a Fraud seem to be extenuated, by referring to the Advice of those by whose Aid it was conducted, or to the confident Opinion they entertained of the Success of their Project. I know this Project was not (nor did I ever mean to contend it was) all her own. Particularly, in that fraudulent Attempt upon publick Justice, it could not be so. But, my Lords, that imparting a Criminal Purpose, to the necessary Instruments for carrying it into Execution, extenuates the Guilt of the Author, is a Conceit perfectly new in Morality, and more than I can yield to. It rather implies Aggravation, and the additional Offence of corrupting these Instruments. Not that I mean by this Observation to palliate the Guilt of such corrupt Instruments. I think it may be fit, and exceedingly wholesome, to convey to Doctors Commons, that those among them, if any such there are, who, being acquainted with the whole Extent of the Prisoner's Purpose, to furnish herself with the false Appearance of a single Woman in order to draw the Duke into such a Marriage, assisted her in executing any Part of it, are far enough from being clear of the Charge contained in this Indictment. They are Accessaries to her Felony; and ought to answer for it accordingly. This is stating her Case fairly. The Crime was committed by her, and her Accomplices. All had their Share in the Perpetration of the Crime: Each is stained with the Whole of the Guilt.

My Lords, I proceed to examine the Witnesses. The Nature of the Case shuts out all Contradiction or Impeachment of Testimony. It will be necessary for your Lordships to pronounce that Opinion and Judgment, which so plain a Case will demand.

*Mr. Solicitor General.*

My Lords, We will now proceed to call our Witnesses.——Call *Ann Cradock*.

*Who came to the Bar, and One of the Clerks held the Book to her, upon which she laid her Hand.*

*Clerk of the Crown.* Harken to your Oath.

The Evidence that you shall give on Behalf of our Sovereign Lord the King's Majesty, against *Elizabeth* Duchess Dowager of *Kingston*, the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth,

So help you G O D.

*Then she kissed the Book.*



*Mr. Wallace.* My Lords, I am desired by the noble Lady at the Bar to apply to your Lordships for an Indulgence, that a Question may be put to the Witness by her Counsel.

*Lords.* Aye, Aye.

*Mr. Wallace.* I shall beg the Witness may inform your Lordships whether she has not had a Security for some Provision, or Benefit, or a Promise, in consequence of the Evidence she is to give on this Indictment?

*Ann Cradock.* No.

*Mr. Solicitor General.* How long have you been acquainted with the Lady at the Bar?

*Ann Cradock.* Above Thirty-two Years.

*Mr. Solicitor General.* Where did you first become acquainted with her?

*Ann Cradock.* I saw the Lady first in *London*, afterwards at *Lainston*.

*Mr. Solicitor General.* What Occasion carried you to the Lady at *Lainston*?

*Ann Cradock.* Along with a Lady that I served.

*Mr. Solicitor General.* Name the Lady.

*Ann Cradock.* Mrs. *Hammer*.

*Mr. Solicitor General.* Was Mrs. *Hammer* any Relation to the Lady at the Bar?

*Ann Cradock.* Her own Aunt.

*Mr. Solicitor General.* Was the Lady at the Bar at *Lainston* along with Mrs. *Hammer*?

*Ann Cradock.* Not when I first went down to *Lainston*.

*Mr. Solicitor General.* Did she come down there afterwards?

*Ann Cradock.* Yes.

*Mr. Solicitor General.* Do you remember seeing Mr. *Augustus Hervey* there at that Time?

*Ann Cradock.* I remember seeing Mr. *Augustus Hervey* there, but not at the Time I first saw the Lady there.

*Mr. Solicitor General.* When did Mr. *Hervey* come there?

*Ann Cradock.* It was in *June*, at the *Winchester* Races.

*Mr. Solicitor General.* How long did he stay there at that Time?

*Ann Cradock.* I cannot particularly say how long he might stay: He was coming and going.

*Mr. Solicitor General.* Was you in *Lainston* Church with Mr. *Hervey* and that Lady, at any Time in that Summer?

*Ann Cradock.* I was.

*Mr. Solicitor General.* At what Time of the Day?

*Ann Cradock.* It was towards Night: It was at Night, not in the Day.

*Mr. Solicitor General.* Upon what Occasion?

*Ann Cradock.* To see the Marriage.

*Mr. Solicitor General.* Name the Persons who were present.

*Ann Cradock.* Mr. *Merrill*, Mrs. *Hammer*, Mr. *Mountenay*, Mr. *Hervey*, Miss *Chudleigh*, and myself.

*Mr. Solicitor General.* Who was the Clergyman?

*Ann Cradock.* Mr. *Amis*, who belonged to the Church.

*Mr. Solicitor General.* Were they married there?

*Ann Cradock.* Yes; I saw them married.

*Mr. Solicitor General.* Was the Marriage kept secret?

*Ann Cradock.* Yes.

*Mr. Solicitor General.* By what Ceremony was the Marriage?

*Ann Cradock.* By the Matrimonial Ceremony; by the Common Prayer Book.

*Mr. Solicitor General.* Was you employed to take Care, that the other Servants should be out of the Way?

*Ann Cradock.* Yes.

*Mr. Solicitor General.* Did they return to Mr. *Merrill*'s House after the Marriage?

*Ann Cradock.* Yes, they did.

*Mr. Solicitor General.* How far is the Church from the House?

*Ann Cradock.* Not a great Distance, but I cannot say how far: It is in the Garden.

*Mr. Solicitor General.* Did Mr. *Amis* return with the Party into the House?

*Ann Cradock.* Not that I saw.

*Mr. Solicitor General.* Did you attend on the Lady as her Maid?

*Ann Cradock.* I did at that Time, her own not being able.

*Mr. Solicitor General.* After the Ceremony, did you see the Parties in Bed together?



*Ann Cradock.* I did.

*A Lord.* Repeat what you said.

*Ann Cradock.* I saw them put to Bed; I also saw Mrs. *Hanmer* insist upon their getting up again.

*Mr. Solicitor General.* Did you see them the next Morning?

*Ann Cradock.* I saw them that Night afterwards in Bed, the same Night after Mrs. *Hanmer* went to Bed.

*Mr. Solicitor General.* Did you see them afterwards in Bed for some Nights after that?

*Ann Cradock.* I saw them particularly in Bed the last Night Mr. *Hervey* was there, for he was to set out in the Morning at Five o'Clock; I was to call him at that Hour, which I did; and entering the Chamber, I found them both fast asleep; they were very sorry to take Leave.

*Mr. Solicitor General.* Can you fix what Year this was?

*Ann Cradock.* I believe it to be in the Year 1744, but I am certain it was the same Year in which the *Victory* was at *Portsmouth*.

*Mr. Solicitor General.* Do you recollect what Time of the Year it was?

*Ann Cradock.* In the Month of *August*, I think.

*Mr. Solicitor General.* What is your Reason for thinking it was in the Month of *August*?

*Ann Cradock.* My Reason is, that it was in the Time of *Maunbill* Fair; and also that there were Green-Gages ripe, which the Lady and Gentleman were both very fond of.

*Mr. Solicitor General.* Do you recollect how long it was after the Death of Mr. *Merrill's* Mother?

*Ann Cradock.* No, I cannot justly say.

*Mr. Solicitor General.* Where did Mr. *Hervey* go, as you understood, the Morning he went away?

*Ann Cradock.* To *Portsmouth*.

*Mr. Solicitor General.* Did you understand that he was then in the Sea Service?

*Ann Cradock.* I did, and that he was going with Admiral *Davers*.

*Mr. Solicitor General.* Have you any particular Reason for knowing that he did go with Admiral *Davers*?

*Ann Cradock.* The Reason I have to believe he did go with him is, the Person whom I married afterwards was Mr. *Hervey's* Servant.

*Mr. Solicitor General.* Was he Servant to him at that Time?

*Ann Cradock.* He was.

*Mr. Solicitor General.* Did you receive any Letter from the Person you afterwards married, who was Mr. *Hervey's* Servant, and attended him?

*Ann Cradock.* I did, from *Port-Mabon*.

*Mr. Solicitor General.* Do you know what Relation Mr. *Merrill* was to the Lady at the Bar?

*Ann Cradock.* First Cousin.

*Mr. Solicitor General.* Who was Mr. *Mountenay*, whom you mentioned as present at the Marriage?

*Ann Cradock.* A Friend of Mr. *Merrill's*, as he pretended.

*Mr. Solicitor General.* Did he live in the Family at that Time?

*Ann Cradock.* He was in the Family at that Time, and had been from the Time of the Death of his Mother.

*Mr. Solicitor General.* Do you know whether any other Part of the Family, of both Parties, were acquainted with the Marriage, except those Persons whom you have mentioned?

*Ann Cradock.* No, I did not at that Time.

*Mr. Solicitor General.* Did the Lady change her Name on the Marriage?

*Ann Cradock.* Never in publick to my Knowledge.

*Mr. Solicitor General.* Had you Occasion after this to see the Lady in *London*?

*Ann Cradock.* I saw the Lady in *London* many Times.

*Mr. Solicitor General.* Do you know whether there were any Children of the Marriage?

*Ann Cradock.* I believe one.

*Mr. Solicitor General.* What Reason have you for believing so?

*Ann Cradock.* The Lady herself told me so, and her Aunt also, whom I ought to have mentioned first. The Lady told me, that she would take me to see the Child.

*Mr. Solicitor General.* Did she offer to carry her Aunt as well as you to see the Child?

*Ann Cradock.* I do not know that.

*Mr.*



*Mr. Solicitor General.* How long after the Marriage was it, that she told you she would take you to see the Child?

*Ann Cradock.* That I cannot say, but it was after Mr. *Hervey* returned a Second Time.

*Mr. Solicitor General.* Returned, from whence?

*Ann Cradock.* I heard he had been at *Port-Mabon*.

*Mr. Solicitor General.* Do you recollect how long Mr. *Hervey* had been absent the First Time?

*Ann Cradock.* No, I do not.

*Mr. Solicitor General.* How long had he been absent the Second Time?

*Ann Cradock.* After his Return the Second Time, I believe the Child to have been begotten.

*Mr. Solicitor General.* How long after Mr. *Hervey's* Second Return was it, that she told you she would carry you to see the Child.

*Ann Cradock.* It was after his First Return.

*A Lord.* I believe there is some Mistake. Let the Witness explain that.

*Mr. Solicitor General.* Was it after Mr. *Hervey's* First or Second Return, that the Lady told you she would carry you to see the Child?

*Ann Cradock.* I believe the First Time.

*Mr. Solicitor General.* Do you recollect how long that was after the Marriage?

*Ann Cradock.* I do not recollect.

*Mr. Solicitor General.* When did you marry Mr. *Hervey's* Servant?

*Ann Cradock.* The 11th of February 1752.

*Mr. Solicitor General.* Did the Prisoner at the Bar say any Thing particular to you about the Child?

*Ann Cradock.* She told me the Child was a Boy, and like Mr. *Hervey*.

*Mr. Solicitor General.* How long did you continue in the Service of Mrs. *Hanmer*?

*Ann Cradock.* Till she died.

*Mr. Solicitor General.* When did Mrs. *Hanmer* die?

*Ann Cradock.* She has been dead Eleven Years the Second of last *December*.

*Mr. Solicitor General.* Had you any Occasion to know what became of the Child, whether it lived or died?

*Ann Cradock.* I know nothing further than what the Lady said. When I expected to go to see it, the Lady came in great Grief, and told me it was dead.

*Mr. Solicitor General.* Have you any Reason to know at what Place the Child was born?

*Ann Cradock.* At *Chelsea*, by reason her Mother could not go there.

*Mr. Solicitor General.* Who informed you that the Child was born at *Chelsea*?

*Ann Cradock.* Mrs. *Hanmer* told me this.

*Mr. Solicitor General.* Have you ever heard it from the Prisoner?

*Ann Cradock.* Yes, I certainly have.

*Mr. Solicitor General.* She said, her Mother could not go there. What do you understand to be the Reason, why Mrs. *Chudleigh* could not go to *Chelsea*?

*Ann Cradock.* By reason her Husband and Son were buried there, as I have been told.

*Mr. Solicitor General.* Had you any Conversation with the Prisoner about the Year 1768, about any Message to be delivered to the Prisoner, that Mr. *Hervey* had given to you?

*Ann Cradock.* I had a Message from Mr. *Hervey*, signifying to the Lady he was determined to be parted from her.

*Mr. Solicitor General.* Did you deliver that Message?

*Ann Cradock.* Not for some Time after I received it, not being able.

*Mr. Solicitor General.* When did you deliver it?

*Ann Cradock.* On Saturday Morning, when the Lady came up to me, and told me, that she knew what had been the Matter with me: I told her Mr. *Hervey* desired me to let her know, that he was determined to be, I should have said *divorced*, but I said *parted*; and also, that he desired me to tell the Lady, she had it in her own Power to assist him. I delivered the Message, and the Lady replied, Was she to make herself a Whore to oblige him?

*Mr. Solicitor General.* Did she appear to be with Child before this Conversation with you?

*Ann Cradock.* She did appear so to be.

*Mr. Solicitor General.* What Parish is Mr. *Merrill's* House in?



*Ann Cradock.* I believe in *St. George's*: His House at *Lainston* is a Parish of itself.

*Mr. Solicitor General.* Are there any other Houses in the Parish besides *Mr. Merrill's*?

*Ann Cradock.* Not at *Lainston*, there is not.

*Mr. Solicitor General.* Was there Service regularly in *Lainston* Church, or did the Family go to any other Church?

*Ann Cradock.* They went to Service at *Sparsholt* Church.

*Mr. Solicitor General.* My Lords, we have no more Questions to ask this Witness at present.

*Lord High Steward.* The Counsel for the Prisoner are at Liberty to ask the Witness any Questions they think proper.

*Mr. Wallace.* Have you not declared to some Persons, that you had an Expectation of some Provision or Benefit on the Event of this Prosecution?

*Ann Cradock.* I never could declare I had any Thing promised me by any Body.

*Mr. Wallace.* Expectation of Provision, from the Persons that prosecute?

*Ann Cradock.* I never had, I know none of the Family.

*Mr. Wallace.* Where have you lived for this Month, or Two, or Three.

*Ann Cradock.* I have lived at *Mr. Beauwater's*.

*Mr. Wallace.* What is the Reason of your having your Residence there?

*Ann Cradock.* In regard to his Lady being a Relation to *Mr. and Mrs. Batburst*.

*Mr. Wallace.* Had your Residence there any Relation to this Prosecution?

*Ann Cradock.* It is unknown to me if it has.

*Mr. Wallace.* What have you to do with *Mr. Batburst*?

*Ann Cradock.* *Mrs. Batburst* is so kind as to have me there, as being a Servant to her Aunt from my Childhood.

*Mr. Wallace.* How long have you been at *Mr. Beauwater's*?

*Ann Cradock.* I am sure I cannot justly say the Day when I came there.

*Mr. Wallace.* How long before this Prosecution was commenced?

*Ann Cradock.* I can't tell when I came there; I can't tell how long I have been there.

*Mr. Wallace.* I do not mean that you should answer to a Day, but according to the best of your Memory.

*Ann Cradock.* About Four Months, I fancy.

*Mr. Wallace.* Was it before or since you appeared before the Grand Jury?

*Ann Cradock.* Since I appeared before the Grand Jury.

*Mr. Wallace.* Do you know who is the Prosecutor of this Indictment?

*Ann Cradock.* *Mr. Meadows*, I imagine.

*Mr. Wallace.* Do you know *Mr. Meadows*?

*Ann Cradock.* I have seen him Twice, or Three Times in my Life, and that is all.

*Mr. Wallace.* Where?

*Ann Cradock.* The First Time I ever saw him, was at *Mr. Beauwater's* House, since I came to Town.

*Mr. Wallace.* Are you to stay at *Mr. Beauwater's*, or to return, when this Prosecution is over?

*Ann Cradock.* The last Home I had is at *Lainston*, where I hope I may return again. I went down there in *August* was a Twelvemonth.

*Mr. Wallace.* Have you never declared to any Body, that you had an Expectation of some Provision from the Cause now in Hand?

*Ann Cradock.* I could not declare it, as I had no Offers made me from the Prosecutor.

*Mr. Wallace.* Have you declared it?

*Ann Cradock.* I have just now said, I could not.

*Mr. Wallace.* Would you be understood, that you have not?

*Ann Cradock.* What was I to declare?

*Mr. Wallace.* Whether you have not declared, whether true or false I do not care, that you had an Expectation of some Provision from this Prosecution?

*Ann Cradock.* I could not declare it, before it was made to me.

*Mr. Wallace.* You must say, whether you did say so or not?

*Ann Cradock.* I never had any Offer from the Prosecution.

*Mr. Wallace.* Had not you an Expectation from the Prosecution?

*Ann Cradock.* No, I could not say that, when they never offered it me.

*Mr. Wallace.* Do you understand the Question generally, or confined to the Prosecutor?

*Ann Cradock.* I think it can be confined to none but himself.



- Mr. Wallace.* Have you any Expectation from any Body else?
- Ann Cradock.* No, none.
- Mr. Wallace.* Nor ever declared so?
- Ann Cradock.* No, I never declared, that I had any such Expectations.
- Mr. Wallace.* At what Time of the Night was this Marriage?
- Ann Cradock.* I cannot possibly tell the Hour; it was at Night.
- Mr. Wallace.* Have not you mentioned to any Body some Hour of the Night?
- Ann Cradock.* I do not know that I have mentioned it, any farther than that it was at Night.
- Mr. Wallace.* You have said, that you was employed to keep the Servants out of the Way at the Time; how came you then to go to the Church?
- Ann Cradock.* I was employed to come out of the Church after the Marriage, and see that the House was clear: After the Marriage, and not before.
- Mr. Wallace.* Was there any Care taken before they went to Church?
- Ann Cradock.* No, I do not know that there was; Mr. and Mrs. *Merrill* dined out that Day, and I do not know that any of the House knew that there was to be a Marriage.
- Mr. Wallace.* Are you sure that Mr. and Mrs. *Merrill* dined out that Day?
- Ann Cradock.* Yes.
- Mr. Wallace.* When did Mrs. *Merrill* die?
- Ann Cradock.* I do not know. Mrs. *Hammer* it was; there was no Mrs. *Merrill* at that Time.
- Mr. Wallace.* Then by Mrs. *Merrill* you meant Mrs. *Hammer*, did you?
- Ann Cradock.* Certainly I did mean Mrs. *Hammer*, for there was no Mrs. *Merrill*.
- Mr. Wallace.* Was you desired to go to the Church?
- Ann Cradock.* I don't know whether I was desired to go, but there I was, that I recollect.
- Mr. Wallace.* Did you go as a Witness, or out of Curiosity?
- Ann Cradock.* I was there to see the Marriage. As to Witness, I was not called to be a Witness.
- Mr. Wallace.* Did any of the Parties know you was in the Church?
- Ann Cradock.* Those that were in the Church knew it.
- Mr. Wallace.* Did you hear the Ceremony performed?
- Ann Cradock.* I did.
- Mr. Wallace.* Did you hear the whole Ceremony?
- Ann Cradock.* I believe so: Certainly.
- Mr. Wallace.* Have not you said, you *did not* hear the Ceremony?
- Ann Cradock.* Not that I know of, and I never was asked to my Knowledge.
- Mr. Wallace.* Do you speak positively that you have not so declared?
- Ann Cradock.* Certainly I do, for I know whether I was asked or not.
- Mr. Wallace.* How long did Mr. *Hervey* stay there after this Marriage?
- Ann Cradock.* I really cannot say how many Days; he was not long there.
- Mr. Wallace.* You said that Mrs. *Hammer* made them get up soon after they went to Bed; how long did Mrs. *Hammer* sit up after that?
- Ann Cradock.* I cannot justly say how many Hours; I can't say whether it might have been One, or Two, or Three Hours.
- Mr. Wallace.* Was it Mrs. *Hammer's* Custom to lock the Door, where Miss *Cbudleigh* lay?
- Ann Cradock.* I never knew, that she did lock the Door at all.
- Mr. Wallace.* Nor any Body by her Order?
- Ann Cradock.* Not to my Knowledge, I never knew the Door ordered to be locked by any Body, nor by myself neither: I am sure I never locked it.
- Mr. Wallace.* You are sure the Door was never locked then, when Mr. *Hervey* went out, when he was made to get up and leave the Room as you have said?
- Ann Cradock.* Went out where? I don't understand.
- Mr. Wallace.* You have said, he was made to get up again.
- Ann Cradock.* To the best of my Knowledge, the Lady got up too, as well as Mr. *Hervey*.
- Mr. Wallace.* And both left the Room?
- Ann Cradock.* I believe they both left the Room, I know nothing to the contrary; but I know they afterwards went to Bed together.
- Mr. Wallace.* Have you not declared, you knew nothing of this Marriage?



*Ann Cradock.* No, never in my Life, to my Knowledge.

*Mr. Wallace.* That you did not remember any Thing about it?

*Ann Cradock.* It is very odd that I can remember it now, and should not have remembered it before: I ever had it in my Memory.

*Mr. Wallace.* Have not you declared, that you did not remember it?

*Ann Cradock.* No, not that I know of.

*Mr. Wallace.* I desire you will give a positive Answer, yes, or, no, whether you have or have not declared it?

*Ann Cradock.* I never could have declared, that which I did not know.

*Mr. Wallace.* That you did not remember any Thing about it?

*Ann Cradock.* No, I never could say that.

*Mr. Wallace.* Did you or did you not say so?

*Ann Cradock.* No, I did not say so.

*Lord Buckingham.* I beg to put One Question to the Witnesses. You know that you speak not only in the Presence of this respectable Court, but in the Presence of Almighty God?

*Ann Cradock.* Yes.

*Lord Buckingham.* Have you, or have you not, ever declared that you did expect an Advantage from the Prosecution? Say aye, or no.

*Ann Cradock.* I must say no: I could not say aye.

*Lord Buckingham.* You have told us, that Mr. *Merrill* and Mrs. *Hammer* went out to Dinner the Day, on which the Marriage was performed; I should be glad to know at what Time Mr. *Merrill* and Mrs. *Hammer* returned home?

*Ann Cradock.* I believe it might be between Seven and Eight o'Clock, as I had given Tea out of the Housekeeper's Room to the Gentleman and Lady by Candle-light.

*Lord Buckingham.* What Day of the Month was it?

*Ann Cradock.* That I cannot tell.

*Duke of Grafton.* Did you ever see the Child, that the Lady at the Bar offered to carry you to see?

*Ann Cradock.* No, I never did.

*Duke of Grafton.* What was the Interval of Time between the Offer to carry you to see the Child, and the Death of that Child?

*Ann Cradock.* That I cannot justly say neither; but as far as I can remember, the Day that I was to go to see the Child, the Lady came and said it was dead.

*Duke of Grafton.* Though you cannot exactly recollect the Interval between the One Transaction and the other, yet still you may speak at large. Was it a Week? Was it a Month? Was it Half a Year?

*Ann Cradock.* It was not a Month, nor yet Half a Year.

*Duke of Grafton.* Were there a few Days Interval between the one and the other?

*Ann Cradock.* There was, but I cannot say how many Days.

*Duke of Grafton.* Did you, in the Space of these few Days, ever express to the Lady at the Bar your Earnestness and Desire to see the Child, which you say the Lady at the Bar told was so like Mr. *Hervey*?

*Ann Cradock.* I expressed my Desire at the Time, when the Lady spoke of the Child to her Aunt.

*Duke of Grafton.* What was the Answer, that you had for not carrying you immediately to the Child?

*Ann Cradock.* The Lady told me, she would come on such a Day with the Princesses Coach, and that I should go and see the Child.

*Duke of Grafton.* Was you examined by the Ecclesiastical Court?

*Ann Cradock.* I was not.

*Duke of Grafton.* Did you know at the Time, that there was such a Process going on here?

*Ann Cradock.* I was told by Mr. *Hervey* there was.

*Duke of Grafton.* Did you offer to Mr. *Hervey*, or to any other of the Parties, to give that Evidence which you now have proved it was material to give?

*Ann Cradock.* He told me, he must call upon me to assist him in his Marriage.

*Duke of Grafton.* Did any Thing else pass relative to the Process in Doctors Commons, after Mr. *Hervey*'s Conversation with you?

*Ann Cradock.* Yes, there certainly was, though I never was called.

*Duke of Grafton.* Did any Thing pass between Mr. *Hervey* and you, or between any of the Parties and you, after that Declaration of Mr. *Hervey*'s to you?

*Ann*



*Ann Cradock.* I was to acquaint the Lady with his Intentions.

*Duke of Grafton.* You said you was to remove the Servants out of the Way at Mr. Merrill's House at the Time of the Marriage: How many Servants might there be about Mr. Merrill's House at the Time of the Marriage?

*Ann Cradock.* The Butler; a Maid, who waited on Miss Merrill; Two House-maids; a Laundry-maid; One of the House-maids belonged to Mrs. Hanmer, who always went down along with her, and there was a Kitchen-maid.

*Duke of Grafton.* Were there any Lights in the Church at the Time of the Ceremony being performed?

*Ann Cradock.* There was a Wax Light in the Crown of Mr. Mountenay's Hat.

*Lord Townshend.* Whether she has ever received or been offered any Thing to withhold her Evidence relative to the supposed Marriage?

*Ann Cradock.* I never have.

*Lord Hillsborough.* Did you ever receive any Letter, offering you any Advantage in case you would appear against the Prisoner, before you was subpoenaed at Hick's Hall.

*Ann Cradock.* I received a Letter from a Friend, wherein I was told, that a Gentleman of their Acquaintance would get me a Sine-cure, but on what Account I knew not.

*Lord Hillsborough.* A Gentleman of whose Acquaintance?

*Ann Cradock.* I do not know who the Gentleman was; it never was explained to me who the Gentleman was; nor I never asked.

*Lord Hillsborough.* Who was the Friend who wrote that Letter to you?

*Ann Cradock.* Mr. Fozard, of Piccadilly.

*Lord Hillsborough.* What Answer did you make to that Letter?

*Ann Cradock.* I made no Answer any further, but that it was very kind in any Body that would assist me in getting me any Thing.

*Lord Hillsborough.* Who is Mr. Fozard?

*Ann Cradock.* A Person that lives near Hyde-park-Corner, and keeps Livery Stables.

*Lord Hillsborough.* You say he wrote you Word, that some of their Friends would get you a Sine-cure?

*Ann Cradock.* I said, a Gentleman of their Acquaintance.

*Lord Hillsborough.* Of whose Acquaintance?

*Ann Cradock.* Mr. Fozard's.

*Lord Hillsborough.* Upon what Account did you conceive or understand that he was to get you a Sine-cure?

*Ann Cradock.* That I cannot tell.

*Lord Hillsborough.* What have you done with the Letter?

*Ann Cradock.* I do not know where the Letter is, I know I have it not.

*Lord Hillsborough.* Will you take upon you to say, that there was not in that Letter an Expression intimating, that if you would appear against the Prisoner at the Bar, a Sine-cure would be gotten for you?

*Ann Cradock.* I certainly do say, there was no such Expression in the Letter; only a Friend of theirs, or a Gentleman of their Acquaintance, I do not know which, would get me a Sine-cure.

*Lord Hillsborough.* Did you, or did you not, by virtue of your Oath, understand that that was to be the Consequence of your appearing against the Prisoner at the Bar?

*Ann Cradock.* I did not know that that was to be the Consequence of my appearing. I had no room to imagine so, because I know not the Person of the Prosecutor, nor none of his Family.

*Lord Hillsborough.* Did you advise with any Body concerning what you should do with regard to that Letter?

*Ann Cradock.* I certainly did apply to a Friend, and acquainted him I had received such a Letter.

*Lord Hillsborough.* What did you write to your Friend?

*Ann Cradock.* I never writ to any Friend, I applied to a Friend, and shew'd the Letter.

*Lord Hillsborough.* Whether you did not ask Advice from some Body, what you should do with regard to that Letter?

*Ann Cradock.* I did not ask any Body what I was to do with it, I received it.

*Lord Hillsborough.* What did you consult that Friend about?

*Ann Cradock.* To let him know I had received such a Letter; but I did not know what it might be upon, or what it might not.



*Lord Hillsborough.* Did he read the Letter?

*Ann Cradock.* Yes.

*Lord Hillsborough.* What Conversation passed between you and him on the Subject of the Letter?

*Ann Cradock.* I told him, I did not know what it might be from, but that I apprehended it might be something concerning my being called upon in Point of the Lady; I think I told him, that I had once been told, that I might have the same settled upon me as the Lady promised me when I went into the Country.

*Lord Hillsborough.* What Reason had you for thinking so?

*Ann Cradock.* The Reason I had for thinking so, was, because I had been told once, that I might have the same given me that the Lady at the Bar offered me, when I was to go into the Country, if I would speak the Truth; but by whom I know not: I never asked the Question.

*Lord Hillsborough.* I desire to know, what you did with that Letter, whether you put it into the Hands of the Person whom you consulted?

*Ann Cradock.* I put it into no one's Hands; the Person had the Letter I consulted.

*Lord Hillsborough.* You put it into that Person's Hand to read it?

*Ann Cradock.* I gave the Letter into that Person's Hands to read it, and told him, he might shew it to Mr. *Hervey*, if he would.

*Lord Hillsborough.* For what Purpose did you desire it might be shewn to Mr. *Hervey*?

*Ann Cradock.* For this Purpose, believing it might be against him, and the Lady; but by whom I knew not, for I never asked the Question, who it was that was to give it.

*Lord Hillsborough.* Did you desire your Friend to shew it to the Prisoner at the Bar?

*Ann Cradock.* That was impossible, for the Lady was not in *England*.

*Lord Hillsborough.* Did you then desire him to shew it to any Body on her Part?

*Ann Cradock.* I should look upon it, if it was shewn to Mr. *Hervey*, it would be on her Part, as being Man and Wife.

*Lord Hillsborough.* Whether you desired it to be shewn to any Body else?

*Ann Cradock.* No, not besides Mr. *Hervey*.

#### A D J O U R N E D.

S A T U R D A Y, A P R I L 20.

A N N C R A D O C K.

*Continuation of her Examination.*

*LORD Hillsborough.* I was exceedingly glad the House was adjourned, but I would much rather it had been adjourned sooner, because I now lie under a good deal of Difficulty to resume the Thread of these Questions, that for my own Information, and for that of the House, I thought highly proper and necessary to be explicitly and exactly answered. My Lords, I think the last Question that I put to the Witness at the Bar, was, whether she had put that Letter, which she said was signed by *Fozard*, into the Hand of any other Person? If I do not mistake, my Lords, she said, she had put it into the Hand of a Friend of hers to read. Upon asking her, whether she had any other Intention, than that of putting the Letter into his Hand? I think she said, she told the Person he might shew the Letter to Mr. *Hervey*, as she apprehended it related to him. Now I desire to ask the Evidence at the Bar, whether she knows, that her Friend did shew that Letter to Mr. *Hervey* or not?

*Ann Cradock.* My Friend did shew it to Mr. *Hervey*.

*Lord Hillsborough.* Did your Friend tell you what Mr. *Hervey* said concerning the Letter?

*Ann Cradock.* My Friend told me, that he desired I should keep the Letter.

*Lord Hillsborough.* Do you mean Mr. *Hervey*, or the Friend desired you to keep the Letter?

*Ann Cradock.* I mean, the Answer, that was given upon the Letter being shewn, was brought by my Friend, and Mr. *Hervey* desired me to keep the Letter.

*Lord*



*Lord Hillsborough.* Did your Friend, who carried the Letter from you to Mr. *Hervey*, say any Thing more to you, than that Mr. *Hervey* desired you should keep the Letter?

*Ann Cradock.* He told me, that I should acquaint the Lady that was abroad with it.

*Lord Hillsborough.* Did you acquaint the Lady that was abroad with it?

*Ann Cradock.* I had it not in my Power so to do.

*Lord Hillsborough.* Did you acquaint any Body else with it?

*Ann Cradock.* I did several of my Acquaintance.

*Lord Hillsborough.* In particular, did you acquaint any Body that was concerned in Business for the Lady?

*Ann Cradock.* No.

*Lord Hillsborough.* I desire to know whether you did by yourself, or by any Body else for you, make any Answer whatever to the Letter to Mr. *Fozard*?

*Ann Cradock.* I went to Mr. *Fozard* when I received the Letter, as in the Letter it was required to know my Age, and where I was born.

*Lord Hillsborough.* I desire you will inform their Lordships of the Whole of what passed between Mr. *Fozard* and you at that Interview?

*Ann Cradock.* Nothing in particular, further than relating to where I was born, and my Age; my Age I did not know. I did not ask, who was to give me the Sine-cure.

*Lord Hillsborough.* Did not you think it extraordinary, that Mr. *Fozard* should inquire of you your Age, and where you was born?

*Ann Cradock.* I certainly did think it extraordinary.

*Lord Hillsborough.* Whether you did not ask the Meaning of it?

*Ann Cradock.* I did not ask any Meaning for it.

*Lord Derby.* You said Yesterday, that you did expect to receive something adequate to what you had received from the Prisoner at the Bar. What did you formerly receive from the Prisoner at the Bar?

*Ann Cradock.* Many Favours in Friendship, but not any Thing in particular.

*Lord Derby.* What was you offered by the Lady?

*Ann Cradock.* Twenty Guineas a Year, to go and settle in the Country, and the Choice of Three different Counties.

*Lord Derby.* At what Time was that Offer made to you?

*Ann Cradock.* The Time I cannot justly remember.

*Lord Derby.* Recollect; how many Years was it ago?

*Ann Cradock.* I believe it may be Three Years ago, or Four, I am not certain.

*Lord Derby.* What was your Answer to that Proposal?

*Ann Cradock.* It made me very unhappy to think that I was to be banished, but I consented to go into *Yorkshire*.

*Lord Derby.* What were the Counties that were proposed to you?

*Ann Cradock.* *Yorkshire*, *Derbysire*, I think, and *Northumberland*.

*Lord Derby.* In consequence of that Consent to go into *Yorkshire*, did you go into *Yorkshire*?

*Ann Cradock.* No, I did not; I went to *Thorseby*; I tried, but I could go no further.

*Lord Derby.* What was the Reason that you could go no further?

*Ann Cradock.* From being unhappy, and going from all my Friends.

*Lord Derby.* Did you receive any Sum of Money in consequence of going as far as *Thorseby*?

*Ann Cradock.* None, no further than was to carry me to the Place, where I said I was to go.

*Lord Derby.* You mentioned an Annuity of Twenty Guineas a Year; has that Annuity been paid, or have you received any Part of it since that Agreement?

*Ann Cradock.* No.

*Lord Coventry.* You said you was present at the Marriage in 1744; I desire to know whether you have ever communicated that Information to any Person till this Year, and to whom?

*Ann Cradock.* I have several Times to many, but to particular Persons I cannot speak.

*Lord Derby.* I should be glad to know whether you do understand, or do not understand, that any Sum or Sums were ever paid to any Person for your Subsistence and Board, on the Part of the Prisoner at the Bar?

*Ann Cradock.* No, I do not know that ever any Sum was paid upon my Account.

*Lord Buckingham.* I desire to ask the Witness, whether she at any Time did receive any Present whatever from the Prisoner at the Bar?



*Ann Cradock.* Several, in Point of Friendship.

*Lord Townshend.* Was you ever offered any Sum of Money at any Time, to conceal any Evidence?

*Ann Cradock.* No.

*Lord Townshend.* By either Side?

*Ann Cradock.* No.

*Lord Camden.* I desire to know whether you saw the Lady at *Thoresby* in the Way to *Yorkshire*?

*Ann Cradock.* I was in the Lady's House, and saw her several Times.

*Lord Camden.* In any of those Interviews did any Thing pass respecting the Annuity of Twenty Guineas a Year, and the Journey you was then making to *Yorkshire*?

*Ann Cradock.* No, not any Thing in particular as to that.

*Lord Camden.* What was the Reason of your Return from *Thoresby*, and not going to your Journey's End?

*Ann Cradock.* My Reason was, from my ill State of Health, and Unhappiness of Mind.

*Lord Littleton.* Did the Lady explain to you what were her Motives for sending you, or, as you called it, *banishing* you, into those distant Counties?

*Ann Cradock.* No, my Lords.

*Lord Derby.* What did you apprehend to be the Lady's Motives for such a Proposal?

*Ann Cradock.* That I was ever at a Loss to know, because I never asked.

*Duke of Ancafter.* Did you consult a Friend on account of the Substance of Mr. *Fozzard's* Letter?

*Ann Cradock.* I did.

*Duke of Ancafter.* I desire you to tell the House, who that Friend was?

*Ann Cradock.* My Friend was Dr. *Hoffack*, who is Physician of *Greenwich* Hospital.

*Duke of Ancafter.* What is become of that Letter, or have you it?

*Ann Cradock.* I have it not, but it is in my Box, I believe, at *Lainston*, as I carried it with me when I went there with my other Things.

*Duke of Richmond.* Was not the Marriage to be kept a Secret?

*Ann Cradock.* Yes.

*Duke of Richmond.* If during the Time the Marriage was to be kept a Secret, any Person had asked you about the Marriage, would you have owned it, or denied it?

*Ann Cradock.* I never from the Time divulged the Secret, until it had been told before.

*Duke of Richmond.* Did no Person, during the Time it was a Secret, ever ask you if you knew it?

*Ann Cradock.* Several have asked me, but I have always replied, *No*.

*Lord President.* Do you not know, that your Husband was examined in the Spiritual Court, in the Cause of *Jaçtitation*?

*Ann Cradock.* I know he was called upon in the Court, but what passed I am an utter Stranger to, as I never asked.

*Lord President.* Had not Mr. *Hervey* intimated to you, that you was to be called upon on that Occasion?

*Ann Cradock.* He did.

*Lord President.* After that did you hear any Thing from Mr. *Hervey*, respecting your Attendance in that Cause?

*Ann Cradock.* Mr. *Hervey* told me, he must call upon me to assist him in the Marriage, and to swear to Mrs. *Hanmer's* Hand-writing.

*Lord President.* Was you ever called upon that Occasion?

*Ann Cradock.* I was not.

*Lord Derby.* Did you live with Mrs. *Hanmer* until the Time of her Death?

*Ann Cradock.* I did.

*Lord Derby.* Which happened Eleven Years ago the 2d of last *December*?

*Ann Cradock.* Yes.

*Lord Derby.* Upon what have you subsisted since that Time.

*Ann Cradock.* Mrs. *Hanmer* left me Two hundred Pounds; one was taken up, the other was left: I quitted the Lady's House, and went to *Newington*. I should have told you the Two hundred Pounds were in this Lady's Hands [*pointing to the Duchess's*] one was taken up, and the other, with my Husband's Income, supported me whilst he lived.



*Lord Derby.* How do you know that that Two hundred Pounds was left you by Mrs. *Hanmer*?

*Ann Cradock.* It was left me in her Will.

*Duke of Ancaſter.* Do you of your own Knowledge aſſert, that there was a Child?

*Ann Cradock.* I do aſſert I was told ſo. I never ſaw the Child.

*Duke of Ancaſter.* Who told you ſo?

*Ann Cradock.* Mrs. *Hanmer* told me ſo, and the Lady told me at our Return out of the Country.

*Duke of Ancaſter.* Who told you there was a Child?

*Ann Cradock.* This Lady at the Bar told me ſo herſelf. Both told me ſo.

*Duke of Ancaſter.* Do you from your own Knowledge affirm, that that Child is dead?

*Ann Cradock.* The Lady at the Bar told me it was dead, as ſhe told me before ſhe would take me to ſee it.

*Duke of Ancaſter.* Did the Lady at the Bar bring the Princeſs of *Wale's* Coach, and carry you to ſee the Child at *Chelſea*?

*Ann Cradock.* The Lady told me ſhe would come in the Princeſs's Coach, and carry me to ſee the Child.

*Lord Radnor.* How old do you apprehend the Child was at the Time of its Death?

*Ann Cradock.* That I can give no Account of: It was very young; but the Age I know not.

*Lord Radnor.* Weeks, Months, or Years?

*Ann Cradock.* Months, but not Years.

*Lord Radnor.* Did you ever hear, that the Child was baptized?

*Ann Cradock.* I did hear that the Child was baptized; but Mrs. *Hanmer* and I were in the Country at that Time.

*Lord Radnor.* Did you ever hear, what the Child's Name was?

*Ann Cradock.* No, I cannot recollect that I did.

*Lord Radnor.* Did you ever hear, where the Child was buried?

*Ann Cradock.* I did hear that it was buried at *Chelſea*.

*Lord Radnor.* Who told you ſo?

*Ann Cradock.* The Lady at the Bar told me ſo herſelf one Day, when I was airing in the Coach with her that Way.

*Lord Forteſcue.* How have you ſubſiſted ſince your Huſband's Death?

*Ann Cradock.* With what I made of my Furniture which was in my Houſe, which was all new.

*Lord Forteſcue.* How long is it ſince your Huſband died?

*Ann Cradock.* Five Years laſt *March*.

*Ordered to withdraw.*

*Lord High Steward.* Who do you call next Mr. Solicitor General?

*Solicitor General.* We deſire to call

*Mr. CÆSAR HAWKINS, who was ſworn in like Manner.*

*Mr. Dunning.* Mr. *Hawkins*, are you acquainted with the Lady at the Bar? and how long have you been ſo?

*Mr. Hawkins.* A great many Years: I believe above Thirty.

*Mr. Dunning.* Are you acquainted with the preſent Lord *Briſtol*? and how long have you been ſo?

*Mr. Hawkins.* I have had the Honour of knowing the Earl of *Briſtol* nearly as many Years.

*Mr. Dunning.* Do you know of any Intercourſe between my Lord *Briſtol* and the Lady at the Bar?

*Mr. Hawkins.* Of an Intercourſe certainly; of Acquaintance undoubtedly.

*Mr. Dunning.* Do you know from the Parties of any Marriage between them?

*Mr. Hawkins.* I do not know how far any Thing, that has come before me in a confidential Truſt in my Profeſſion, ſhould be diſcloſed, conſiſtent with my profeſſional Honour.

[*Queſtion and Anſwer repeated.*]

*Mr. Dunning.* I truſt your Lordſhips will ſee nothing in my Queſtion, that can betray confidential Truſt, or diſhonour Mr. *Hawkins* in giving it. My Queſtion is ſimply, whether Mr. *Hawkins* knows, from the Parties, of any Marriage between them?

*Lord*



*Lord High Steward.* The Question that was asked by the Counsel at the Bar, is, “Whether the Witness knew, from any Information of either of the Two Parties, that they were married?” The Witness objects to it, whether he is to answer any Questions that are inconsistent with his professional Honour: Your Lordships are to determine, whether the Question put by the Counsel at the Bar, shall be asked?

*Lord Mansfield.* I suppose Mr. *Hawkins* means to demur to the Question upon the Ground, that it came to his Knowledge some Way, from his being employed as a Surgeon for one or both of the Parties; and I take for granted, if Mr. *Hawkins*, understands that it is your Lordships Opinion, that he has no Privilege on that Account to excuse himself from giving the Answer, that then, under the Authority of your Lordships Judgment, he will submit to answer it: Therefore, to save your Lordships the Trouble of an Adjournment, if no Lord differs in Opinion, but thinks that a Surgeon has no Privilege to avoid giving Evidence in a Court of Justice, but is bound by the Law of the Land to do it; [if any of your Lordships think he has such a Privilege, it will be a Matter to be debated elsewhere, but] if all your Lordships acquiesce, Mr. *Hawkins* will understand, that it is your Judgment and Opinion, that a Surgeon has no Privilege, where it is a material Question, in a Civil or Criminal Cause, to know whether Parties were married, or whether a Child was born, to say, that his Introduction to the Parties was in the Course of his Profession, and in that Way he came to the Knowledge of it. I take it for granted, that if Mr. *Hawkins* understands that, it is a Satisfaction to him, and a clear Justification to all the World. If a Surgeon was voluntarily to reveal these Secrets, to be sure he would be guilty of a Breach of Honour, and of great Indiscretion; but, to give that Information in a Court of Justice, which by the Law of the Land he is bound to do, will never be imputed to him as any indiscretion whatever.

*Mr. Dunning.* My Question is, Whether you knew from either of the Parties, that there was a Marriage between them?

*Mr. Hawkins.* From the Conversation with both Parties I apprehended there was a Marriage, but nothing appeared in Proof before me: I mean nothing as legal Proof, but *Conversation*.

*Mr. Dunning.* But did they in Conversation admit, that they were Man and Wife? and is that the Ground upon which you form that Apprehension?

*Mr. Hawkins.* Yes it is; they did admit it in Conversation.

*Mr. Dunning.* Do you, or do you not, know that a Child was the Fruit of that Marriage?

*Mr. Hawkins.* Yes, I do.

*Mr. Dunning.* Can you tell their Lordships, about what Time that Child was born? and where?

*Mr. Hawkins.* About the Time I cannot tell. If I ever put down any Thing in Writing at the Time, I might have destroyed it afterwards, according to my Custom, which is to destroy Papers that are of no Use, and which might be improper to be found after my Decease.

*Mr. Dunning.* Inform their Lordships about what Time this might be, as near as your Memory will enable you to do.

*Mr. Hawkins.* I should suppose it was about Thirty Years ago; but I do protest I do not know.

*Mr. Dunning.* Where was this Child born?

*Mr. Hawkins.* At *Chelsea*, near to *Chelsea* College; but I forget the Name of the Street.

*Mr. Dunning.* Was this Marriage, and the Birth of that Child, at that Time kept a Secret?

*Mr. Hawkins.* I was told it was to be a Secret.

*Mr. Dunning.* Do you know what is since become of that Child?

*Mr. Hawkins.* I believe it died in a little Time afterwards.

*Mr. Dunning.* By your Answer, that you understood it was to be kept a Secret, did you mean the Marriage, or the Birth of the Child, or both?

*Mr. Hawkins.* Both.

*Mr. Dunning.* Which of the Parties can you recollect it was, Mr. *Hervey* or Miss *Chudleigh*, that desired this might be kept a Secret? or both?

*Mr. Hawkins.* I should take for granted both equally.

*Mr.*



*Mr. Dunning.* Do you know enough of the then *Mr. Hervey's* Motions to be able to inform their Lordships, whether this Child was born after his First or Second Return from Sea, subsequent to the Marriage?

*Mr. Hawkins.* No, I do not know enough of his Motions to answer this Question.

*Mr. Dunning.* Do you know what Age this Child had attained before its Death?

*Mr. Hawkins.* I protest I do not remember now.

*Mr. Dunning.* Can you recollect about what Time of the Year it was you first heard this Child was born, and about what Time of the Year you heard it died?

*Mr. Hawkins.* I do not know, I might hear of the Death immediately.

*Mr. Dunning.* Did you ever attend the Child in the Course of your Profession?

*Mr. Hawkins.* I did once: I am not sure whether I did not attend more, but I remember I attended it once.

*Mr. Dunning.* Do you remember whether your Recollection of this Transaction was, or was not, helped about the Time of the Commencement of the Suit in the Spiritual Court?

*Mr. Hawkins.* Really I do not know any Thing that passed to bring it to my Mind then.

*Mr. Dunning.* Was you, or was you not, applied to by either of the Parties, or both, at the Time of the commencing this Suit in the Spiritual Court?

*Mr. Hawkins.* I was applied to by the Earl of *Bristol*.

*Mr. Dunning.* Will you be so good as to tell what was the Purport of Lord *Bristol's* then Application to you.

*Mr. Wallace.* On the Part of the noble Lady, I must submit to your Lordships, that nothing said in the Absence of the Lady is Evidence against the Prisoner at the Bar.

*Mr. Dunning.* I will put the Question in a Way, that it shall be liable to no Objection. Did you, or did you not, in consequence of Lord *Bristol's* Application, apply to the Lady at the Bar?

*Mr. Hawkins.* I did.

*Mr. Dunning.* Then tell us, what was the Purport of Lord *Bristol's* Application to you, and what Message you carried from Lord *Bristol* to the Lady at the Bar?

*Mr. Hawkins.* To the best of my Remembrance the Earl of *Bristol* met me in the Street, and stopped me, telling me that he should be glad I would call on him at his House the first Morning I had Half an Hour to spare, and that if I could then fix the Time, he would take Care to be in the Way, and that no other Company should interrupt the Conversation. He intimated that it was not on account of his own Health, but on account of an old Friend of mine. I named the Time, and went to him; I found his Lordship expecting me; upon a Table, at a little Distance from his Right Hand, there lay Two or Three Bundles of Papers, folded up as these Papers are (*taking up some Papers at the Bar*) to these Papers he often pointed in Course of what he said afterwards. After making some polite Apologies to me for the particular Trouble he was then giving me, he told me it was on the present Duchefs of *Kingston's* Account: That he wished me to carry her a Message upon a Subject that was very disagreeable, but that he thought it would be less shocking to be carried by, and received from, a Person she knew, than from any Stranger: That he had been for some Time past very unhappy on account of his Matrimonial Connections with the Duchefs, Miss *Chudleigh*, that was then: That he wished to have his Freedom; which the Criminality of her Conduct, and the Proofs which he had of it (which, in pointing to the Papers I before mentioned, he said he had for some Time past, with Intent and Purpose to procure a Divorce, been collecting and getting together); that he believed they contained the most ample and abundant Proofs, Circumstances, and every Thing relative to such Proof; that he intended to pursue his Prosecution with the strictest Firmness and Resolution; but that he retained such a Regard and Respect for her, and as a Gentleman to his own Character, that he wished not to mix Malice or ill Temper in the Course of it; but that in every Respect he would wish to appear and act on the Line of a Man of Honour and of a Gentleman; that he wished (he said) she would understand that his soliciting me to carry the Message should be received by her as a Mark of that Disposition; that as most probably in the Number of so many testimonial Dispositions as were there collected, there might be many offensive Circumstances named, superfluous to the necessary legal Proofs, that if she pleased I might inform her, that her Lawyers, either with or without herself, might, in Conjunction with his Lawyers, look over all the Depositions, and that if any Parts were found tending to indecent or scandalous Reflections, which his Gentlemen of the Law should think might be omitted without weakening his Cause, he himself should have no Objection to it: That as he intended



tended only to act upon the Principles of a Gentleman, and a Man of Honour, he should hope she would not produce any unnecessary or vexatious Delays to the Suit, or enhance the Expences of it, as he did not intend to prosecute to gain by any Demands of Damages, I think, or to that Purpose. I delivered this Message to the Duchess as well as I could. I do not presume now, that either the precise Words, or the Indentity of the Words or Expressions can be recollected by me, but it was to the Purport, as near as possibly I can remember, of what I have said.

*Mr. Dunning.* Will you recollect, whether upon this Conversation any distinct Proposition was stated to the Duchess which required an Answer? or, what Answer you carried back from the Duchess for that Purpose? You will of course be referring yourself to what passed between you and the Duchess.

*Mr. Hawkins.* I delivered my Message to the Duchess. After a little Time taken for Consideration, I do not recollect exactly what her Grace desired me to report to the Earl of *Bristol*; but it was to this Effect: That she was obliged to him for the polite Parts of his Message, but, as to the Subject of the Divorce, she should cut that short by wishing him to understand, that she did not acknowledge him for her legal Husband, and should put him to the Defiance of such Proof: That she had then already, or should immediately, institute a Suit in the Ecclesiastical Court, which she called, I think, a *Facilitation of Marriage*; but, as he had promised before, that he would act upon the Line of a Man of Honour and a Gentleman in his own intended Suit, she hoped that he would pursue the same Line now, and that he would confine himself to the Proofs of legal Marriage only, and not to other Proofs of Connections or Cohabitations; if he did, that he would make it a Process of no long Delay, and that either he would gain an equal Freedom to himself by a Sentence of that Court, declaring them to be free, or he would the sooner be able to institute his own intended Suit.—The Earl of *Bristol* received my Message as one affected and struck by it, making no Reply or Answer for Two or Three Minutes; then, not speaking to me, but rather seeming to express his own Thoughts aloud in short Sentences, that he did not conceive he should have his equal Freedom by that Method. I believe I should have mentioned, that her Grace desired, in Part of her Message, that nothing might be brought forwards, which might be the Subject of useless Conversation and Scandal. He said, in Reply, that he was no more inclined to bring forward any Thing for the Lovers of scandalous Conversation only, than she could be, and that, if he could not establish the Proof of legal Matrimony (I do not remember the Words, but to the Sense of this) that he was too much a Gentleman to bring any Thing before the Public relative to other Connections with the Lady. I do not remember that any Thing material passed, or more than this.

*Mr. Dunning.* Do you recollect that in any subsequent Conversation with the Lady, you was desired to apply to the Gentleman for any other Civility in the Course of this Cause?

*Mr. Hawkins.* Before the First Attendance that I have lately alluded to in Illness, Mrs. *Chudleigh*, her Mother, did us the Honor of a private Family Friendship. After these Messages, her Grace now and then called on my Wife in an Evening, frequently saying, she was passing to or from her Law Gentlemen. When I happened to see her Grace, I every now and then asked how her Suit went on? to which, I think, she always seemed to answer cheerfully, “*Very right,*” and “*Well.*”

*Mr. Dunning.* Did you ever carry any other Messages?

*Mr. Hawkins.* Two or Three Times, I cannot recollect which, she asked me to deliver some Message to the Earl of *Bristol*, I am not sure whether one was not a Letter, or whether upon the Occasion of her asking me to deliver Something, for my own Memory I might not ask her to write it down, but I really do not remember at present, though I have endeavoured to recollect what the Subject of these Messages were; but I know they were of very trifling Import, nothing that could have struck me strongly, or I should have remembered them; and I understood they were rather given to me, as if the Earl of *Bristol* was delicate in receiving any Message from her Grace, and that I was only to expect a verbal Answer on that Account.

*Mr. Dunning.* Do you recollect, whether any of these Messages related to any Witnesses or Witnesses to be produced or kept back?

*Mr. Hawkins.* Certainly not; I never had a Supposition, that the Duchess would have given me such a Message. Nothing appeared to me, but what contained Matter of little Import, and of the most honourable Kind.

*Mr. Dunning.* Did you ever observe, or do you now recollect, any Ground to form a Belief, whether the Parties had forgotten or remembered, that there was then living one of the Witnesses to the Fact of the Marriage.



*Mr. Hawkins.* I profess I do not recollect that: I have heard it in common Conversation in the Town, but not that ever I remember from either him or her at that Time.

*Mr. Dunning.* At what Time did you receive that Report from him or her?

*Mr. Hawkins.* I think I have seen the Earl of *Bristol* but once since the Commencement of this Prosecution, and then his Lordship seemed rather to speak peevishly.

*Lord Mansfield.* They will not examine to what Lord *Bristol* has said since the Commencement of the Prosecution.

*Mr. Dunning.* Was any Thing, that my Lord *Bristol* said on that Subject, communicated to the Lady?

*Mr. Hawkins.* I certainly might, and did, I believe, tell her Grace what was said.

*Lord Mansfield.* Then you may go on.

*Mr. Dunning.* Then tell the House what Lord *Bristol* said, and you repeated to the Lady?

*Mr. Hawkins.* His Lordship seemed to be peevish, that such a Person was now brought forward, and as he had heard it supposed, I believe, for want of her having such Allowance or such Care taken of her by the Dukes, as he supposed she used to have. If I understood him right, the Earl of *Bristol* said, this Person had been with him to express Things to that Purpose; and said, that if she had been as easy to come at, or had had as good a Memory when that Cause was carried on in the Ecclesiastical Court, that he believed the Issue of it would have been different.

*Mr. Dunning.* Will you be so good as to recollect, whether you communicated this to the Lady, and what passed upon that Occasion?

*Mr. Hawkins.* I did communicate it to the Dukes; and I thought she was rather out of Temper with the Message, or with me, she calling at my House at a Time I was very much in Haste to go out upon Business, and could not give her Grace that Time to hear, what she seemed to wish to have to talk more upon it. She offered to come again, but I was then not well in my Health at all, and perhaps, as she might think, not quite so civil, would not name another Time with her Grace for her to call upon me, but said, that I would take an Opportunity, as soon as I was able, of waiting upon her Grace at her own House. I did do this some Time after, and was told at the Door, that her Grace was not at Home; I left my Name; and said I should call again. After some Days Interval I did so, and then was told, that her Grace was at Home, but was laid down to Sleep; from whence I concluded, that I was not to call again.

*Mr. Dunning.* Am I to understand from you, that this last Message from my Lord *Bristol* was never the Conversation between you and the Dukes?

*Mr. Hawkins.* I did relate it to her during the Time, that she was at my House.

*Mr. Dunning.* Have you at any Time since heard any Thing from the Dukes on that Subject?

*Mr. Hawkins.* I did hear, but not from any good Authority, that her Grace was rather angry.

*Mr. Dunning.* Has the Lady never conversed with you on the Subject of this living Witness to the Marriage from that Time to this?

*Mr. Hawkins.* I have never seen her Grace but once since, and that was Yesterday Morning for a few Minutes at the Duke of *Newcastle's*.

*Mr. Dunning.* Generally, at any Time whatever have you heard any Thing from the Dukes on the Subject of this living Witness to the Marriage, where she was, or any Thing concerning her?

*Mr. Hawkins.* I protest nothing conclusive. I might hear there was such a Person, but it was never related to me, whether she was a better, or worse Evidence; nothing relative to that, whether she was a better or worse Evidence, or that she was afraid of her, or any Thing to that Purpose.

*Mr. Dunning.* Am I to understand you to have heard her say, that there was such a Witness?

*Mr. Hawkins.* In what looser Conversation I cannot tell, but nothing that ever made me know, that there was such a Person, who had such material Knowledge.

*Mr. Dunning.* I understand you, that from Lord *Bristol* you understood there was a surviving Witness to the Marriage. My Question is, Whether you ever learnt the same Thing from the Lady, or not?

*Mr. Hawkins.* If it was, it was some accidental looser Conversation, not as trusting me with such a Knowledge.

*Mr. Dunning.* Was it then mentioned in any looser or accidental Conversation, or any Conversation?

*Mr.*



*Mr. Hawkins.* I protest, it is impossible to remember that with any Degree of Precision or of Use.

*Mr. Dunning.* I did not mean to ask you to recollect any Particulars of the Conversation, but simply to the Point, whether the Duchess ever stated to you, or acknowledged, there was a living Witness to the Marriage?

*Mr. Hawkins.* No, I do not remember that she ever stated to me, or said, that there was a living Witness to the Marriage.

*Mr. Dunning.* Is it a Fact that ever you learned from the Lady?

*Lord Derby moved the Clerk might read this Part of the Evidence.*

*Mr. Hawkins.* I rather (if I may say any Thing) understood from her Grace, that there was some looser Marriage, not quite in the common Manner. I think I could remember an Expression of her Grace's once, upon her Grace's speaking on the Occasion. If I remember, I asked her Grace how her Suit went on? This was towards the latter Part of it. She looked grave, and desired to speak to me in another Room. She said, that she had had a great Deal of Concern and Agitation of Mind, since she last saw me, which I remarked to her had been for a longer Interval of Time on her not calling at the House upon my Wife in the usual Manner. Her Grace said, that she had had so much Concern upon what she had not expected at the Commencement of her Suit, from finding that a positive Oath was expected from her Grace that she was not married, and which she had for some Time together apprehended would be put to her in that Form, that she thought she should have dropped her Suit entirely, for that she would not for the whole World have taken that direct Kind of positive Oath; but that what had been offered to her, had been so complicated (I think, I understood) with other Things that were certainly not true, that she could and had taken the Oath with a very safe Conscience. To some Questions, I do not remember the Words to her Grace from me, how then she came to institute a Suit at all? She answered me, "O, for that Matter (I think it was) the Ceremony as done, was such a scrambling shabby Business (I do not say these were the precise Words, but to that Purport) and so much incomplete, that she should have been full as unwilling to have taken a positive Oath that she was married, as that she was not married."

*N. B. This Part of the Evidence was ordered to be read by the Clerk, who accordingly read it.*

*Mr. Dunning.* I should be glad, if you would tell their Lordships, what it was that was so particular in this Business? if the Lady ever explained it to you?

*Mr. Hawkins.* I never had an Explanation from that Moment. I had within myself a Curiosity from the Time that I carried the Message to my Lord *Bristol* from her Grace, and his Reception of it; I had rather imagined that there was some Marriage of which legal Proofs could not be produced, but that was only my own Notion: Before that Time I had no real Authority at all; I did not know myself honestly what to think of it.

*Mr. Dunning.* Did the Lady ever explain to you, by what Reason it happened, that the Question, when it came to be put, came in so much more palatable a Form than she expected it?

*Mr. Hawkins.* No, not in the least: I should not have presumed to have asked such a Question; nor did she give me any Explanation at all.

*Mr. Dunning.* Was any Thing ever said by Lord *Bristol*, and communicated to the Lady, respecting an Intention of his to appeal from this Sentence?

*Mr. Hawkins.* I know nothing of that.

*Mr. Dunning.* What said her Grace on that Subject?

*Mr. Hawkins.* Her Grace had told me, that the Sentence was passed, and that it was irrevocable and final to them Two, unless my Lord *Bristol*, within a certain limited Time, did something to keep the Cause open. I do not know what that was. That there was, she believed, some Demur at that Time, as my Lord *Bristol* was not satisfied with the Sentence, and had made some Demand by his Proctor, if I understood right, for the Costs of Suit which were decreed, I believe, against him.

*Mr. Dunning.* Do you know whether the Costs of Suit were ever paid by my Lord *Bristol*?

*Mr. Hawkins.* I do not, but I believe they were. I was going on to say what I recollected upon that. They had some Demurs upon the Costs of Suit; but that if my Lord *Bristol* insisted upon it, she would give her Proctor Directions not to let such a Thing stop the Closing of the Suit.

*Mr.*



*Mr. Dunning.* Do you then know whether my Lord *Bristol*, who by the Terms of the Sentence was to pay the Costs, did not, upon this, receive the Costs he had been put to in the Suit?

*Mr. Hawkins.* I know nothing more than I have mentioned: Not a Tittle more nor less.

*Mr. Dunning.* Do you know of no other Means that were used to satisfy my Lord *Bristol*, and to prevent this Cause from continuing any longer open?

*Mr. Hawkins.* No.

*Mr. Dunning.* Do you know nothing of any Bond, that was given from any Body to any Body, respecting this Cause and this Question?

*Mr. Hawkins.* Not the least in the World.

*Mr. Dunning.* Am I to understand, that you say you know nothing of any Bond that has any direct, immediate, or other Relation to this Subject?

*Mr. Hawkins.* Not the least that ever I heard of.

*Mr. Dunning.* You are not then a Trustee in any such Bond?

*Mr. Hawkins.* Oh, no, certainly not.

*Mr. Dunning.* Can you give us the Date of the Time, when the First Message was conveyed from Lord *Bristol* to the Lady through you?

*Mr. Hawkins.* I was endeavouring, before I came into the Court, to recollect it, but I could not: I put nothing down in Writing relative to it.

*Mr. Dunning.* Can you recollect the Year?

*Mr. Hawkins.* The Message must have been immediately before the Commencement of the Suit, whenever that was.

*Mr. Dunning.* I presume, though you used the Terms, *her Grace*, and *his Lordship*, you perfectly well understood, that neither of the Parties had a Right to these Appellations at the Time these Circumstances passed?

*Mr. Hawkins.* Yes, certainly.

*Mr. Dunning.* Does any Circumstance impress you with the Recollection of the Time of the Year, when this Conversation passed; if you cannot tell us the exact Year?

*Mr. Hawkins.* I might have inquired how long the Suit lasted; but I protest I do not recollect now any particular Circumstances to bring it to my Mind.

*Mr. Wallace.* My Lords, I have no Question on the Part of the Prisoner to put to *Mr. Hawkins.*

*Duke of Ancafter.* Did you attend the Child?

*Mr. Hawkins.* I think Once.

*Duke of Ancafter.* Was it a Boy or a Girl?

*Mr. Hawkins.* A Boy.

*Duke of Ancafter.* Do you speak from your own Knowledge that the Child is dead?

*Mr. Hawkins.* No; but have no Reasons to doubt it.

*Duke of Ancafter.* Do you know of your own Knowledge, that That Child was the Child of the Prisoner at the Bar?

*Mr. Hawkins.* No, I could have no Proof of that; for from the Time that her Grace was brought to-bed of it, I never saw the Child till I was sent for to it in its Illness; perhaps I had hardly ever heard of it: I had never seen it.

*Duke of Ancafter.* Did you attend the Duchess at the Time she lay in?

*Mr. Hawkins.* I did not at her Lying-in: I was desired, in case at any future Time it had been necessary, that I should have been a Witness of the Birth of that Child.

*Duke of Ancafter.* Did you understand that Child to be the legitimate Child of the Duchess of *Kingston* and *Mr. Hervey*?

*Mr. Hawkins.* I did suppose so at that Time.

*Duke of Ancafter.* Was you told so by any Body?

*Mr. Hawkins.* I could not be necessarily told so at that Time, because I had been told of the Marriage before.

*Duke of Grafton.* Was you, from the Conversation that passed with the Party at that Time, convinced that it was a supposed, or that it was a real Marriage; and were any Expressions used relative to the concealing the Birth of the Child?

*Mr. Hawkins.* I understood, at that Time, that it was a real Marriage.

*Duke of Grafton.* Were there Expressions made Use of, that would not have been made Use of in any other Circumstance?

*Mr. Hawkins.* I do not remember any particular Expression at all, only that I was desired to attend, with a View and Purpose that I might be a Witness to the Birth of that Child; being,



being, as I suppose, thought more proper, as a Physical Man, to be in the Room at the Time of a Delivery and the Birth of a Child than any other Person.

*Lord Lyttelton.* Who first informed you of the Marriage?

*Mr. Hawkins.* I should rather apprehend it came from the Duchefs, before I saw my Lord Bristol.

*Lord Lyttelton.* Do you recollect how long that was ago?

*Mr. Hawkins.* I do not indeed; it was a great many Years ago.

*Lord Lyttelton.* Do you remember to have heard any particular Circumstances related to you, by either of the Parties, concerning the Celebration of that Marriage?

*Mr. Hawkins.* No, never more than what I have mentioned just now.

*Lord Camden.* Was you in the Room at the Time of the Delivery?

*Mr. Hawkins.* To the best of my Remembrance I certainly was.

*Lord Camden.* Did you ever see the Child itself?

*Mr. Hawkins.* At the Time of the Delivery I dare say I did. Afterwards I never did, but when I was sent for on purpose to see it.

*Lord Camden.* Had you then any certain Knowledge of its being the Prisoner's Child?

*Mr. Hawkins.* It is impossible for me to say when I saw the Child some Months afterwards, that I could know it to be the same Child.

*Lord Ravensworth.* Did you not understand, that the Duchefs apprehended and was convinced, that the Sentence in the Ecclesiastical Court was final?

*Mr. Hawkins.* Undoubtedly so.

*Lord Ravensworth.* And that she was at Liberty to marry again, unless the Sentence was appealed from within a limited Time?

*Mr. Hawkins.* Most certainly.

*Lord Ravensworth.* Who delivered the Prisoner?

*Mr. Hawkins.* I was endeavoring to recollect before I came, who was present besides myself, and who delivered her Grace; but I protest I have forgotten it, so as not to recollect. I could not recollect, it is so long ago.

*Ordered to withdraw.*

*The Honourable SOPHIA CHARLOTTE FETTIPLACE sworn.*

*Mr. Attorney General.* How long have you been acquainted with the Prisoner at the Bar?

*Mrs. Fettiplace.* A great many Years.

*Mr. Attorney General.* Did you know the Lady before the Year 1744?

*Mrs. Fettiplace.* My Lords, I have no other Knowledge of any of the Circumstances to be inquired after, than what arises from my Connexion formerly with the Lady; and unless your Lordships require it of me as a Witness for Justice, I should wish to be excused.

*Lord High Steward.* The Lady must certainly disclose what she knows for the Purposes of Justice.

*Mr. Attorney General.* Did you know the Prisoner at the Bar before the Year 1744?

*Mrs. Fettiplace.* I cannot recollect.

*Mr. Attorney General.* Did you know the Prisoner before she was Maid of Honour to the late Princess of Wales.

*Mrs. Fettiplace.* No, I did not.

*Mr. Attorney General.* What Conversation have you ever had with the Prisoner relative to her Marriage with Mr. Hervey?

*Mrs. Fettiplace.* I believe I have heard her say, that she was married to him.

*Mr. Attorney General.* Can you recollect what Circumstances she has mentioned respecting that Marriage, where, and at what Time, and before what Witnesses?

*Mrs. Fettiplace.* In Hampshire, in a Summer-house, in a Garden.

*Mr. Attorney General.* Can you recollect upon what Occasions these Conversations have passed between you and the Prisoner?

*Mrs. Fettiplace.* Upon my Word I cannot pretend to say that: It is long ago.

*Mr. Attorney General.* Do you recollect any Conversation respecting the Child, which the Prisoner had by Mr. Hervey?

*Mrs.*



*Mrs. Fettiplace.* I know nothing about it.

*Mr. Attorney General.* Can you recollect, how often in Conversation it has been said between the Prisoner and you, that she was married to Mr. *Hervey*?

*Mrs. Fettiplace.* I believe but Once.

*Mr. Attorney General.* My Lords, I shall not trouble Mrs. *Fettiplace* with any more Questions.

*Lord High Steward.* Would the Counsel for the Prisoner ask the Witnesses any Questions?

*Mr. Wallace.* My Lords, I shall not ask Mrs. *Fettiplace* any Questions.

*Mr. Solicitor General.* My Lords, I would now call Lord *Barrington*.

*Lord BARRINGTON, who was in like Manner sworn.*

*Mr. Solicitor General.* How long have you been acquainted with the Lady at the Bar?

*Lord Barrington.* Above Thirty Years.

*Mr. Solicitor General.* Did you ever hear from the Lady at the Bar, that she was married to Mr. *Hervey*?

*Lord Barrington.* My Lords, I am come here in Obedience to your Lordships Summons, ready to give Testimony, as to any Matter that I know of my own Knowledge, or that has come to me in the usual Way; but if any Thing has been confided to my Honour, or confidentially told me, I do hold, with humble Submission to your Lordships, that as a Man of Honour, as a Man regardful of the Laws of Society, I cannot reveal it.

*Lord High Steward.* When the last Witness but one (Mr. *Hawkins*) was at the Bar, he made something like the same Excuse for his not answering the Questions put to him. He was then informed by a noble and learned Lord, and the whole Court agreed with that Lord, that such Questions were to be answered in a Court of Justice.

*Lord Barrington.* I have no Doubt, but that the Question is a proper Question to be asked by a Court of Justice, otherwise your Lordships would not have permitted it to be asked. But, my Lords, I think every Man must act from his own Feelings; and I feel, that any private Conversation intrusted to me, is not to be reported again.

*A Lord.* His Lordship will recollect the Oath that he has taken, is, that he shall declare the *whole* Truth.

*Lord Barrington.* My Lords, As I understand the Oath, I can decline answering the Question that has been asked me without acting contrary to that Oath, without being guilty of Perjury. But, if it is the Opinion of your Lordships, that I am bound by that Oath to answer, and that I shall be guilty of a Perjury if I do not answer, in that Case, my Lords, I shall think differently, for I will not be perjured.

*Duchess of Kingston.* I do release my Lord *Barrington* from every Obligation of Honour. I wish, and earnestly desire, that every Witness, who shall be examined, may deliver their Opinions in every Point justly, whether for me or against me. I came from *Rome* at the Hazard of my Life to surrender myself to this Court; I bow with submissive Obedience to every Decree, and do not even complain, that an Ecclesiastical Sentence has been deemed of no Force, although such a Sentence has never been controverted during the Space of One thousand Four hundred and Seventy-five Years.

*Lord Barrington.* My Lords, I do solemnly declare to your Lordships, on that Oath that I have taken, and on my Honour, that I have not had the least Communication made to me of the Duchess of *Kingston's* Generosity. I have not had the least Communication with her Grace by Letter, Message, or in any other Way, for more than Two Months; and I had no Idea of being summoned as a Witness here, until the *Easter* Holy-days, so that her Grace's Generosity is entirely spontaneous, and of her own Accord. But, my Lords, I have a Doubt, which no Man can resolve better than your Lordships, because your Honour is as high as any Men. I have a Doubt, whether, thinking it improper that I should betray confidential Communications before the Duchess consented that I should, and gave me my Liberty; whether her Grace's Generosity ought not to tie me more firmly to my former Resolutions?

*Duke of Richmond.* For one, I think that it would be improper in the noble Lord to betray any private Conversations. I submit to your Lordships, that every Matter of Fact, not of Conversation, which can be requested, the noble Lord is bound to disclose.

*Lord Mansfield.* I mean only to propose to your Lordships, to avoid adjourning to consider this Question or any Thing further upon it at present, that the Counsel might be allowed to call other Witnesses in the mean Time, and that Lord *Barrington* may have an Opportunity



Opportunity of considering of the Matter, if the Counsel should think proper to call his Lordship again.—[*This Proposal was over-ruled.*]

*The Counsel against the Dukes desired to withdraw the Witnesses.*

*Lord Camden.* My Lords, I understand from the Bar, that rather than your Lordships should be perplexed with any Question, which may arise upon the noble Lord's Difficulty in giving his Evidence at the Bar, the Counsel would rather wave the Benefit of his Evidence in the Cause. My Lords, if that be their Resolution, and they think, that safely and without Prejudice to this Prosecution they may venture to give up that Evidence, your Lordships, to be sure, will acknowledge the Politeness of the Surrender. But, my Lords, now I am upon my Legs, you will give me Leave to make one short Remark on this Proceeding, and to hope that your Lordships, sitting in Judgment on Criminal Cases, the highest and most important, that may affect the Lives, Liberties, and Properties of your Lordships; that you shall not think it befitting the Dignity of this High Court of Justice to be debating the *Etiquette* of Honour, at the same Time, when we are trying Lives and Liberties. My Lords, the Laws of the Land, I speak it boldly in this grave Assembly, are to receive another Answer from those, who are called to depose at your Bar, than to be told that in Point of Honour and of Conscience they do not think, that they acquit themselves like Persons of that Description, when they declare what they know. There is no Power of Torture in this Kingdom to wrest Evidence from a Man's Breast, who withholds it; every Witness may undoubtedly venture on the Punishment, that will ensue on his refusing to give Testimony. As to casuistical Points, how far he should conceal or suppress that, which the Justice of his Country calls upon him to reveal, that I must leave to the Witness's own Conscience.

*Lord Lyttelton.* The Laws of the Land have spoken clearly on this Occasion, and if your Lordships had applied them to the noble Lord at the Bar, he has told your Lordships that he is willing to submit to your Judgment. But, my Lords, it is yet a Question, whether or not the noble Lord will be perjured? It is a Question not decided by your Lordships, that he will be perjured, if he refuses to betray a Confidence. I am sure that I feel, and I apprehend your Lordships as Men of Honour feel, the full Weight of the noble Lord's Objection; he will speak to Matters of Fact, but he does not desire to speak merely to Conversation; and, my Lords, I am not surprized that he should make that Objection, for if you consider how loose and inaccurate all Evidence of Conversation must be, it takes off in a Court of Justice much from its Availment. The noble Lord has told you, that confidential Conversation may have passed between him and the noble Lady at the Bar: He has stated to you his Doubts, and I apprehend he is not obliged to go on with his Evidence, until your Lordships have unanimously pronounced, that it is your Opinion that he is obliged so to do.

*Lord High Steward.* If the Counsel for the Prosecution say, that they have no Questions to ask the noble Lord, he may withdraw.

*Lord Barrington.* My Lords, Might I be allowed to say a Word or two, before I withdraw from this Bar! It is impossible that any Person can revere this High Court, indeed any Court of Justice in this Country, more than I do. It is not, my Lords, from Contumacy, of which I am incapable: It is not with any View or Purpose that any of your Lordships would disapprove, as Individuals, I am certain, that I have taken the Part which I have done. I do not say, that there are no Cases, in which a Person ought not to reveal private Conversation. There are Cases, in my Opinion, in which he should. There are Cases, in my Opinion, in which he should not: And, my Lords, no Person can draw the Line but himself. But, my Lords, I have recollected (I am obliged to the Counsel for the Prosecution, who are willing to admit me to withdraw. I return them my Thanks. I dare say in that they have consulted my Feelings as much as they could, consistent with the Duties of their Station) but I have recollected, my Lords, since the generous Manner in which the Dukes of *Kingston* has been pleased to absolve me from all Ties, I have recollected, that she said, she wished and desired that I might say any Thing. If her Grace thinks that any Thing I can say, consistent with Truth, can tend to her Justification, I am then ready to be examined to private Communications.

*Mr. Solicitor General.* I do not desire to examine the noble Lord. I stated to your Lordships, that I do not think the Cause, in which my Duty engages me, will at all suffer by having Deference to any Difficulty that the noble Lord may entertain. I will not examine the noble Lord on the Concession of the Lady at the Bar. The noble Lord stands at your



Lordships Bar a Witness. Having taken the Oath, though I do not examine him, the Prisoner may.

*Mr. Wallace.* At the same Time that I express my Astonishment at the Offer, Lord *Barrington* is not called to the Bar as a Witness for the Prisoner. The noble Lady at the Bar has her Witnesses, in her Turn, to call, with which she shall trouble your Lordships.

*Duke of Richmond.* I do not look on a Witness at the Bar to be the Witness of the Counsel, or of the Prisoner; but the Witness of the House. I shall, therefore, ask a Question or Two of the noble Lord. I will not distress the noble Lord's Feelings by inquiring into confidential Matters. I will merely ask Questions of Fact. The First Question I would ask the noble Lord is, Whether he knows any Fact by which he is convinced that *Mr. Hervey* was married to *Miss Chadleigh*?

*Lord Barrington.* I do not know of any Fact, which will prove the Marriage between the Duchess of *Kingston* and *Mr. Hervey*, of my own Knowledge.

*Duke of Richmond.* The noble Lord must leave it to the House to judge whether it will or not. But does his Lordship know any Fact relative to that Matter?

*Lord Barrington.* I do not know any Thing of my own Knowledge that can tend to prove that Marriage. I know nothing but what I have heard in the World, and from Conversation.

*Lord Radnor.* I am afraid your Lordships, by your Acquiescence, have admitted a Rule of Proceeding here, which would not be admitted in any inferior Court in the Kingdom. I desire, therefore, to ask the noble Lord, Whether he knows any Matter of Fact relative to that Marriage?

*Lord Barrington.* My Lords, If I do, I cannot reveal it; nor can I answer the Question without betraying private Conversation.

*Moved to adjourn. Adjourned to the Chamber of Parliament.*

*After an Adjournment of some Time, the Lords returned to Westminster-Hall.*

*Lord High Steward.* My Lord Viscount *Barrington*, I am commanded by the Lords to acquaint your Lordship, that it is the Judgement of this House, that you are bound by Law to answer all such Questions as shall be put to you.—Has the Counsel for the Prosecution any Question to put to the Witness at the Bar?

*Mr. Solicitor General.* We shall not ask the noble Lord any Questions.

*Lord High Steward.* Has the Counsel for the Prisoner any Question to put to the Witness at the Bar?

*Mr. Wallace.* Not any.

*Lord Radnor.* Does the Witness know from Conversation with the Lady at the Bar, that she was married to the Earl of *Bristol*?

*Lord Barrington.* My Lords, I have already told your Lordships the Motives which induce me to think that I cannot, consistent with Conscience, with Honour, or with Probity, answer such Questions, as will tend to disclose confidential Communications made to me. At the same Time I informed your Lordships, that if the Oath went so far as that I should break that Oath, if I did not answer all Questions which could be put to me; if that was the Determination of your Lordships, I said I would not break my Oath. My Lords, I continue in the same Opinion and Principle. My own Judgment, as far as it guides me, which is very imperfectly, does tell me, that I am not obliged to answer all Questions that can be put to me. But, my Lords, though nobody can draw the Line of Conscience, of Honour, and of Probity in this Case but myself, yet in Point of Law, and in Interpretation of Law, and the Oath I have taken, I am desirous of Assistance from those who can best give it me, and I had much rather trust almost any Man's Judgment than my own. I do not dare to ask again your Lordships Opinion on that Point. But, my Lords, might I be permitted to apply to the learned Counsel who are near me; if it is the Opinion of the learned Counsel, that I am obliged by my Oath to answer the noble Lord's Question, I will readily answer it.

*Lord Effingham.* I apprehend, that no Question can be put in this Court on a Matter of Law to the Counsel at the Bar.

*Several Lords said, "You may ask the Counsel."*



*Lord Barrington.* My Lords, I have put the Question to the Attorney General, and I give him my Thanks. He says, he thinks I am obliged by my Oath to answer all Questions. That being the Case, I have nothing more to say, than humbly to beg your Lordships Pardon for having given you so much Trouble, and to beg and entreat that you will believe, that nothing but the tenderest and the strongest Feelings, and the most determined Resolution to do what was Right in my Situation, could have induced me to give you so much Trouble.

*Lord Radnor.* Whether his Lordship knows from Conversation with the Lady at the Bar, that she was married to the Earl of *Bristol*?

*Lord Barrington.* My Memory I have found by long Experience to be a very erroneous one, and especially with relation to Things past long ago. To the best of my Memory and Belief, the Duchess has never honored me with any Conversation on the Subject for many, many Years past; I believe I might say for above Twenty Years past: And, my Lords, that being the Case, I must answer that Question very doubtfully; but after the Solution which the learned Counsel has given to my Doubts, I mean not to conceal any Thing from your Lordships. Thinking it right to be examined, I think it right to give frank Answers, and any Doubt in any Thing I say will arise from my not remembering well the Circumstances. The Duchess of *Kingston* many (I should not say too much if I was to say Thirty Years ago) did entrust me with a Circumstance in her Life, relative to an Engagement of a Matrimonial Kind with the Earl of *Bristol*, then Mr. *Hervey*.

*Lord Radnor.* Whether his Lordship understood, that that Matrimonial Engagement, which had already passed, was a Marriage?

*Lord Barrington.* I understood, there had been a Matrimonial Engagement entered into, but whether it amounted to a legal Marriage or not, I am not Lawyer or Civilian enough to judge.

*Lord Radnor.* Did his Lordship ever understand, that there was Issue of that Marriage?

*Lord Barrington.* Upon my Word I cannot say; I do not know that the Duchess ever made any Communication of that Sort to me. I had heard of it in the World, but I do not know, that the Duchess ever communicated to me the Circumstance of her having had any Issue.

*Lord Radnor.* Does his Lordship know any Thing of a Bond entered into on the Part of the Prisoner at the Bar, of late Years, relative to the Suppression of Evidence, or the Payment of Costs of Suit in the Ecclesiastical Court?

*Lord Barrington.* I never had the least Communication from the Duchess of *Kingston*, or from any Person relative to any Thing of the Kind; I do not recollect that I ever heard of any such Thing even in the World; and the Duchess of *Kingston* has never communicated to me, in the Course of her Life, to the best of my Memory or Belief, any Thing which was, at the Time she was pleased to communicate it to me, in the least a Deviation from the strictest Rules of Virtue and Religion.

*Ordered to withdraw.*

My Lords, Is it too much to beg, that what I have said at the Bar may be read over to me? Part of it is of a nice Nature; I may have expressed myself improperly; the Writer may have taken it down erroneously; I should be glad to have it read over to me, that I may correct it in your Lordships Presence.

*Here the universal Voice was "Read! Read!" but Lord Barrington spared the House the Trouble, by addressing himself to their Lordships as follows:*

My Lords, I find by the Clerk, that the Part which is of the nicest Kind with relation to me, wherein I expressed the Difficulties and Feelings I had on the Subject of Questions that I thought I ought not to answer, and why and on what Ground I have since thought it my Duty, understanding that my Oath obliges me to it, to give my Answers; I find, my Lords, that Part has not been taken down by the Clerk, and therefore I shall give your Lordships no further Trouble.

*Mr. Dunning.* My Lords, we desire next to produce

*Mrs. JUDITH PHILLIPS, who was sworn in like Manner.*

*Mr. Dunning.* You was the Widow of Mr. *Amis*, was you not?

*Mrs. Phillips.* Yes.

*Mr. Dunning.* Mr. *Amis* was Parson of the Parish of *Lainston* in *Hampshire*?

*Mrs. Phillips.* Yes.

*Mr.*



*Mr. Dunning.* Did you know a Family of the Name of *Merrill*?

*Mrs. Phillips.* I did.

*Mr. Dunning.* Was, or was not, *Mr. Merrill's* House in that Parish?

*Mrs. Phillips.* It was.

*Mr. Dunning.* How long since did your Husband die?

*Mrs. Phillips.* Seventeen Years ago.

*Mr. Dunning.* Do you know the Lady at the Bar?

*Mrs. Phillips.* Very well.

*Mr. Dunning.* How long have you known the Lady at the Bar?

*Mrs. Phillips.* About Thirty Years.

*Mr. Dunning.* Was you privy to her Marriage in your Husband's Life-time?

*Mrs. Phillips.* I was not at the Wedding; but I heard my Husband say, he married them.

*A Lord.* That is not Evidence.

*Mr. Dunning.* Had you not any other Means of knowing that Fact from the Lady at the Bar herself?

*Mrs. Phillips.* Yes.

*Mr. Dunning.* Do you remember the Lady at the Bar coming to *Winchester*?

*Mrs. Phillips.* Very well.

*Mr. Dunning.* When?

*Mrs. Phillips.* She came about the Middle of *February*, 1759.

*Mr. Dunning.* Was that in your Husband's Life-time, or since his Death?

*Mrs. Phillips.* In my Husband's Life-time.

*Mr. Dunning.* Was it long before, and how long before *Mr. Amis's* Death?

*Mrs. Phillips.* Six Weeks.

*Mr. Dunning.* What was the Occasion of the Lady's Visit to *Winchester*?

*Mrs. Phillips.* For a Register of her Marriage.

*Mr. Dunning.* If you recollect any Particulars of what passed upon that Occasion, state them.

*Mrs. Phillips.* She came to the *Blue Boar* in *Kingsgate-street*, *Winchester*, and sent for me by Six o'Clock in the Morning. When I went to her, she asked me if I thought *Mr. Amis* would give her a Register of her Marriage? I told her, I thought he would. Then I asked her to my House, and when she came, she asked me to go up with her to *Mr. Amis*, and ask if he would see her and give her a Register of her Marriage? I went up to *Mr. Amis*, and told *Mr. Amis* what the Lady had desired. *Mr. Amis* desired to see the Lady. Then I came down and told her, that *Mr. Amis* at that Time was confined to his Bed; the Lady went to *Mr. Amis*, and told *Mr. Amis* her Request. Then *Mr. Merrill* and the Lady consulted together whom to send for, and they desired me to send for *Mr. Spearing* the Attorney. I did send for him; and during the Time the Messenger was gone, the Lady concealed herself in a Closet; she said, she did not care that *Mr. Spearing* should know that she was there. When *Mr. Spearing* came, *Mr. Merrill* produced a Sheet of Stamped Paper, that he brought to make the Register upon; *Mr. Spearing* said, it would not do, it must be a Book, and that the Lady must be at the making of it. Then I went to the Closet, and told the Lady; then the Lady came to *Mr. Spearing*, and *Mr. Spearing* told the Lady a Sheet of Stamped Paper would not do, it must be a Book. Then the Lady desired *Mr. Spearing* to go and buy one. *Mr. Spearing* went and bought one, and, when brought, the Register was made. Then *Mr. Amis* delivered it to the Lady; the Lady thanked him, and said it might be an Hundred thousand Pounds in her Way; at the same Time she added, that she had had a Child by *Mr. Hervey*, and that it was a Boy, but that it was dead; and that she had borrowed an Hundred Pounds of her Aunt *Hanmer* to buy Baby Things. Before *Mr. Merrill* and the Lady left my House, the Lady sealed up the Register, and gave it to me, and desired I would take Care of it until *Mr. Amis's* Death, and then deliver it to *Mr. Merrill*.

*Mr. Dunning.* Did it accordingly remain in your Hands until your Husband's Death, and then deliver it to *Mr. Merrill*?

*Mrs. Phillips.* I did.

*Mr. Dunning.* Do you recollect, whether *Mr. Merrill* accompanied the Lady from the Time you first saw her in *Winchester* to your Husband's House, or did *Mr. Merrill* join them afterwards when they were there?

*Mrs. Phillips.* He joined them afterwards.

*Mr. Dunning.* Do you remember, whether any other Entry was then made in this Register-book, besides the Entry of this Marriage?

*Mr.*



*Mrs. Phillips.* I don't remember any.

*Mr. Dunning.* Do you recollect to have seen any Thing of the Lady at the Bar since your Husband's Death?

*Mrs. Phillips.* Many Times.

*Mr. Dunning.* Do you recollect any Conversation, that has passed between you at any of those Times?

*Mrs. Phillips.* After I had delivered the Register to Mr. *Merrill*, I waited upon the Lady at her House at *Knightsbridge*, and found her in the Garden. I told her, I had delivered the Register to Mr. *Merrill*; she thanked me for it; and desired I would take no Notice of it; at the same Time she said Mr. *Swino* was in the Garden, and hoped I would take no Notice to him of the Affair.

*Mr. Dunning.* Do you recollect any further Conversation about this Book, after Mr. *Merrill's* Death, with the Lady?

*Mrs. Phillips.* I was once a fishing with the Lady, and she told me some Things that had passed in the Family. She told me, that Mrs. *Batburst* had used her very ill, for she had got all the Papers Mr. *Merrill* had of hers at the Time of his Death. Upon which I asked her, what was become of the Register? She told me the Minister of the Parish had it.

*Mr. Dunning.* Was, or was not, the Mrs. *Batburst* you have spoken of, the Daughter of that Mr. *Merrill*?

*Mrs. Phillips.* She was.

*Mr. Dunning.* Do you recollect any other Conversation with the Lady at the Bar, after her Marriage with the Duke of *Kingston*?

*Mrs. Phillips.* Yes; I waited upon her in *Arlington-street*, after her Marriage with the Duke of *Kingston*. She said to me, Was it not very good-natured of the Duke to marry an old Maid? I looked her in the Face and smiled, but said nothing then. She asked me, if Mr. *Hervey* had sent to me at the Time of her Trial? I said he had not sent to me.

(The Book shewn to the Witnesses.)

*Mr. Dunning.* Can you be sure, whether that is the Book you have been speaking of?

*Mrs. Phillips.* I am very sure.

*Mr. Dunning.* I believe there are the Vestiges of the Seals about it still?

*Mrs. Phillips.* There are.

*Mr. Dunning.* Where it was sealed up?

*Mrs. Phillips.* Yes.

*Mr. Dunning.* Look at the Entries in the Book; are they not your Husband's Writing? and were they not made in your Presence?

*Mrs. Phillips.* They are my Husband's Hand-writing, and they were made in my Presence.

*Mr. Dunning.* They were made likewise in the Presence of the Lady at the Bar, were they not?

*Mrs. Phillips.* They were.

(Clerk reads.)

“ *Marriages, Births, and Burials in the Parish of Lainston. 2d of August, Mrs. Susannah Merrill, Relief of John Merrill, Esq; buried. 4th of August 1744, Married the Honourable Augustus Hervey, Esq; in the Parish Church of Lainston, to Miss Elizabeth Chadleigh, Daughter of Colonel Thomas Chadleigh, late of Chelsea College, deceased. By me Thomas Amis.*”

*Mr. Dunning.* My Lords, I have done with this Witness.

*Lord High Steward.* Would the Counsel for the Prisoner ask this Witness any Questions?

*Mr. Mansfield.* I should be glad first to see the Book.—I would wish to know by what Means you now subsist? what Support you have?

*Mrs. Phillips.* Upon my own private Fortune.

*Mr. Mansfield.* Where do you live?

*Mrs. Phillips.* At *Bristol*.

*Mr. Mansfield.* Is your Husband living or dead?

*Mrs. Phillips.* Alive.

*Mr. Mansfield.* What Employment was he in, before he lived at *Bristol* upon his Fortune?



- Mrs. Phillips.* He was Steward to the Duke of *Kingston*, and a Grafier.
- Mr. Mansfield.* Was he not turned out of the Service of the Duke of *Kingston*?
- Mrs. Phillips.* I believe he was not turned out.
- Mr. Mansfield.* Do not you know, whether he was or not?
- Mrs. Phillips.* He wrote a Letter to the Duke, and desired to leave him.
- Mr. Mansfield.* Do you know then, that he was not turned out?
- Mrs. Phillips.* Yes.
- Mr. Mansfield.* Had he been threatened to be turned out, before he sent that Letter?
- Mrs. Phillips.* Not that ever I heard of.
- Mr. Mansfield.* Had your Husband had any Differences or Disputes with the Duke of *Kingston*?
- Mrs. Phillips.* No, not that I know.
- Mr. Mansfield.* Was his Reason then for quitting the Service of the Duke of *Kingston* merely his own Inclination, without any particular Reason or Cause?
- Mrs. Phillips.* He thought the Duke looked cool upon him: For what Reason he could not tell.
- Mr. Mansfield.* Had the Duke ever expressed any Cause of Dislike to him?
- Mrs. Phillips.* Not that I know of.
- Mr. Mansfield.* How long have you left *Bristol*?
- Mrs. Phillips.* About Four Months.
- Mr. Mansfield.* Where have you lived?
- Mrs. Phillips.* Sometimes in one Place, sometimes in another.
- Mr. Mansfield.* In what Places.
- Mrs. Phillips.* Sometimes at the *Turf Coffee-house*, sometimes in *St. Mary Axe*.
- Mr. Mansfield.* How much of the Time at the *Turf Coffee-house*?
- Mrs. Phillips.* I really cannot say exactly.
- Mr. Mansfield.* Your are not asked as to a Week. Have you lived there the greater Part?
- Mrs. Phillips.* The greater Part.
- Mr. Mansfield.* Who has supported you at the *Turf Coffee-house*?
- Mrs. Phillips.* Ourselves.
- Mr. Mansfield.* Have you paid the Expences of your Support there?
- Mrs. Phillips.* That I do not know any Thing of.
- Mr. Mansfield.* Do you not know, that the Whole of your Expence at the *Turf Coffee-house* is to be defrayed by the Profecutor, *Mr. Evelyn Meadows*?
- Mrs. Phillips.* I do not know it is.
- Mr. Mansfield.* Have you not understood so?
- Mrs. Phillips.* I have not.
- Mr. Mansfield.* Nor do you believe it?
- Mrs. Phillips.* I cannot tell what to believe, or what is to be done.
- Mr. Mansfield.* Cannot you tell, whether you believe that your Expences at the *Turf Coffee-house* are to be defrayed by *Mr. Meadows*?
- Mrs. Phillips.* No, I do not. I do not know any Thing of that.
- Mr. Mansfield.* Do you not know, by whom you expect the Expence of your Support at the *Turf Coffee house* is to be paid?
- Mrs. Phillips.* I do not know by whom it is to be paid.
- Mr. Mansfield.* Have you seen *Mr. Evelyn Meadows* at the *Turf Coffee-house*?
- Mrs. Phillips.* I have.
- Mr. Mansfield.* How often may you have seen that Gentleman there?
- Mrs. Phillips.* I cannot tell.
- Mr. Mansfield.* Many Times, or only Once or Twice?
- Mrs. Phillips.* I may have seen him Twice or Three Times.
- Mr. Mansfield.* Have you not seen him oftener than that, there?
- Mrs. Phillips.* I have seen him frequently in the Yard.
- Mr. Mansfield.* Have you not had frequent Conversations with him?
- Mrs. Phillips.* Not frequent.
- Mr. Mansfield.* Have you not conversed with him sometimes at the *Turf Coffee house*, sometimes at other Places.
- Mrs. Phillips.* No where, but at the *Turf Coffee-house*.
- Mr. Mansfield.* Who has been present at such Conversations?
- Mrs. Phillips.* My Husband.



- Mr. Mansfield.* Who else?
- Mrs. Phillips.* No one else.
- Mr. Mansfield.* Has not *Mr. Fozard* been present at some of these Conversations?
- Mrs. Phillips.* Never.
- Mr. Mansfield.* Have you not been at *Mr. Fozard's* House with *Mr. Meadows*?
- Mrs. Phillips.* Never; by Accident on *Christmas Day* I called at his Door, and he was there.
- Mr. Mansfield.* Was you in Company with *Mr. Meadows* at *Mr. Fozard's*?
- Mrs. Phillips.* I was.
- Mr. Mansfield.* Does *Mr. Fozard* assist *Mr. Meadows* in the Course of this Prosecution?
- Mrs. Phillips.* I know nothing of that.
- Mr. Mansfield.* Do not you know, that *Mr. Fozard* has assisted *Mr. Meadows* in looking out for Witnesses?
- Mrs. Phillips.* I don't know any Thing about it.
- Mr. Mansfield.* Have you not yourself been present at Conversations with *Mr. Fozard* about this Prosecution?
- Mrs. Phillips.* Nothing, but what was merely accidental.
- Mr. Mansfield.* How often has that Accident happened, that you have been present at Conversations with *Mr. Fozard* about this Prosecution?
- Mrs. Phillips.* I never was at *Mr. Fozard's*, but Twice.
- Mr. Mansfield.* Has *Mr. Fozard* been at the *Turf Coffee-house* with you?
- Mrs. Phillips.* He came to see *Mr. Phillips*, when he had the Gout.
- Mr. Mansfield.* How often might *Mr. Fozard* visit you at the *Turf Coffee-house*?
- Mrs. Phillips.* He came to see *Mr. Phillips*, but not me.
- Mr. Mansfield.* How often might he visit *Mr. Phillips* there?
- Mrs. Phillips.* About Three Times.
- Mr. Mansfield.* Have you ever met *Mr. Fozard* at any other Places besides the *Turf Coffee house* and his own House?
- Mrs. Phillips.* Never.
- Mr. Mansfield.* Do you know of any Promise made to you or your Husband of any Benefit or Advantage depending upon the Event of this Prosecution?
- Mrs. Phillips.* None in the World.
- Mr. Mansfield.* Did you never hear of any such Promise being made to you or your Husband?
- Mrs. Phillips.* Never.
- Mr. Mansfield.* Have you never said, that any such Promise or Offer was made?
- Mrs. Phillips.* Never, nor it never was.
- Mr. Mansfield.* Have you never said any Thing to that Purpose?
- Mrs. Phillips.* No, never to any Body.
- Mr. Mansfield.* Have you never made any Mention of any Kind of Benefit or Advantage you was to receive from the Evidence you should give on this Prosecution?
- Mrs. Phillips.* Not in the least; I don't want it, nor wish it.
- Mr. Mansfield.* Did I understand you right, when you said, that at the Time of the Entry of the Marriage in this Register no other Entry was made?
- Mrs. Phillips.* I don't remember that; I remember very well standing at the Bed's Feet when the Register was made.
- Mr. Mansfield.* Do not you know whether any other Entry was made at that Time?
- Mrs. Phillips.* I don't, for I was backwards and forwards in the Room.
- Mr. Mansfield.* How come you then to know, that the Register of this Marriage was made in the Book at that Time?
- Mrs. Phillips.* I saw it.
- Mr. Mansfield.* Did you read it at that Time?
- Mrs. Phillips.* I heard *Mr. Amis* read it.
- Mr. Mansfield.* Did you hear him read any Thing else besides the Entry of the Marriage?
- Mrs. Phillips.* Nothing but that, for I was going backwards and forwards in the Room.
- Mr. Mansfield.* Do you know nothing at all, whether any Thing else was entered besides that at the Time of the Marriage?
- Mrs. Phillips.* I did not see any Thing but that, though it might, as I was going backwards and forwards.
- Mr. Mansfield.* Did you see the Entry of the Marriage in the Book?
- Mrs. Phillips.* I did.



*Mr. Mansfield.* If you saw that, must not you have seen whether there were any other Entries made on the same Leaf?

*Mrs. Phillips.* I heard it read; I never saw it afterwards, but when the Lady sealed it up.

*Mr. Mansfield.* Did not you take Notice that there were other Entries?

*Mrs. Phillips.* I did not.

*Mr. Mansfield.* You took Notice of nothing upon the Paper but the Entry of this Marriage?

*Mrs. Phillips.* Of nothing else.

*Mr. Mansfield.* Did you keep the Paper long enough before you, or did the Lady at the Bar keep the Book long enough before her, for her to see, whether what she heard read was written on the Paper?

*Mrs. Phillips.* She held it in this Manner (*describing the Manner*) open, and I saw it as I stood by her: I did not read it, but heard it read.

*Mr. Mansfield.* Did all the Persons, who were present, hear what was said about the Hundred Pounds lent by Mrs. Hanmer?

*Mrs. Phillips.* No, they did not; the Lady said she had borrowed an Hundred Pounds of her Aunt Hanmer to buy Baby Things.

*Mr. Mansfield.* Who did the Lady tell that to?

*Mrs. Phillips.* To Mr. Amis and to me.

*Mr. Mansfield.* Did she speak it loudly or softly, or how?

*Mrs. Phillips.* She spoke it as she was sitting by the Bedside talking to Mr. Amis.

*Mr. Mansfield.* When did you tell any Body of such Register?

*Mrs. Phillips.* I really cannot say exactly when, but I have said, I had it in my Possession.

*Mr. Mansfield.* When did you first mention it?

*Mrs. Phillips.* I cannot tell.

*Mr. Mansfield.* Was Mr. Merrill present at the Time when this Entry was made in the Register?

*Mrs. Phillips.* He was.

*Mr. Mansfield.* Was he in the Room the whole Time that this Conversation passed, that you have mentioned, of lending an Hundred Pounds by Mrs. Hanmer?

*Mrs. Phillips.* No, he was not.

*Mr. Mansfield.* Did Mr. Merrill come with the Lady, or the Lady before him, or without him?

*Mrs. Phillips.* The Lady before him, for Mr. Merrill was gone to *Lainston* to his Seat.

*Mr. Mansfield.* When Mr. Merrill came, did not the Lady repeat the Conversation, that had been about the Child and the Hundred Pounds?

*Mrs. Phillips.* There was nothing of that said before Mr. Merrill.

*Mr. Mansfield.* Was any Thing said about making any other Entry in the Register, besides that of the Marriage?

*Mrs. Phillips.* Nothing that I heard.

*Mr. Mansfield.* When did Mr. Merrill come into the Room, before the Entry was made in the Book, or after?

*Mrs. Phillips.* Before.

*Mr. Mansfield.* Was Mr. Merrill in the Room at the Time that it was made?

*Mrs. Phillips.* He was.

*Mr. Mansfield.* Who was it brought the Stamp Paper?

*Mrs. Phillips.* Mr. Merrill.

*Mr. Mansfield.* Was Mr. Merrill in the Room when the Lady concealed herself, as you have said?

*Mrs. Phillips.* He was.

*Mr. Mansfield.* Who else was in the Room?

*Mrs. Phillips.* No one except myself.

*Mr. Mansfield.* Now look at the Book.

*Mrs. Phillips.* I know the Hand perfectly well.

*Mr. Mansfield.* Is the Whole of that, which is written on that Leaf, the Writing of her Husband?

*Mrs. Phillips.* It is.

*Mr. Mansfield.* You have said that you went to *Arlington street*, can you name any Person that you saw there?

*Mrs.*



- Mrs. Phillips.* No one was in the Room, when I went, except the Lady.  
*Mr. Mansfield.* Can you name any Person that saw you there?  
*Mrs. Phillips.* Only a Servant for some Time, and then a Millener came.  
*Mr. Mansfield.* Can you name those Persons?  
*Mrs. Phillips.* I can't; I don't know them.  
*Mr. Mansfield.* Can you name neither of them?  
*Mrs. Phillips.* The Servant was *Fozard*.  
*Mr. Mansfield.* Can you name no other Servants that you saw there?  
*Mrs. Phillips.* No; I had an Inflammation in my Eye, and the Lady was exceedingly kind to me; she ordered an Egg to be boiled for me, and *Fozard* brought it, in order that it might be opened and laid on my Eye.  
*Mr. Mansfield.* Can you name any other Servants whom you saw there?  
*Mrs. Phillips.* I don't remember.  
*Lord Camden.* My Lords, I observe in the Entry of the Register the Words "was married" are struck through with a Black Line; I want to know of the Witnesses whether she can account for that Stroke?  
*Mrs. Phillips.* I cannot.  
*Mr. Dunning.* It is a Repetition. There is Marriage written in the Margin. "August the 24th, married." The Entry then proceeds, "The Honorable *Augustus Hervey*, Esq; "was married," which being a Repetition, I suppose they struck that through with a Black Line.  
*Lord Camden.* I believe it is so.  
*Mr. Dunning.* If your Lordships please, the next Witnesses to be called is

The Reverend Mr. STEPHEN KENCHEN, who was sworn in like Manner.

- Mr. Dunning.* You succeeded Mr. *Amis* in this Church at *Lainston*, I believe?  
*Mr. Kenchen.* I did.  
*Mr. Dunning.* When did you first see that Book that he has in his Hand, and how did it come there?  
*Mr. Kenchen.* The first Time that I saw the Book was after the Death of Mrs. *Hanmer*, Aunt to Mr. *Merrill*, who was buried in the Vault of that little Church.  
*Mr. Dunning.* By whom was that Book produced to you, and for what Purpose?  
*Mr. Kenchen.* In order to register Mrs. *Hanmer*'s Burial.  
*Mr. Dunning.* By whom?  
*Mr. Kenchen.* By Mr. *Merrill*.  
*Mr. Dunning.* Did you accordingly make an Entry of the Burial of Mrs. *Hanmer*?  
*Mr. Kenchen.* I made an Entry of the Burial of Mrs. *Hanmer*.  
*Mr. Dunning.* What then became of the Book?  
*Mr. Kenchen.* Mr. *Merrill* carried it back again to his own House.  
*Mr. Dunning.* When did you next see the Book?  
*Mr. Kenchen.* At the Death of Mr. *Merrill*.  
*Mr. Dunning.* By whom was the Book then produced to you?  
*Mr. Kenchen.* I cannot say; either by Mr. or Mrs. *Batburst*, or in the Presence of them both.  
*Mr. Dunning.* Did you then make an Entry of the Burial of Mr. *Merrill*?  
*Mr. Kenchen.* I did.  
*Mr. Dunning.* What then became of the Book?  
*Mr. Kenchen.* I have had it in my Possession ever since.  
*Mr. Dunning.* My Lords, I shall ask no more Questions of this Witness.  
*Lord High Steward.* Mr. *Wallace*, would you ask this Witness any Questions?  
*Mr. Wallace.* I have no Questions to put to this Witness.  
*Mr. Dunning.* If your Lordships please, we will now call

The Reverend Mr. JOHN DENNIS, who was sworn in like Manner.

- Mr. Dunning.* Look at that Book: Was you acquainted with the Hand-writing of the late Mr. *Amis*?  
*Mr. Dennis.* I knew him perfectly well.

Mr.



*Mr. Dunning.* Do you know his Hand-writing when you see it?

*Mr. Dennis.* I have seen his Hand-writing often, as succeeding him in the Living.

*Mr. Dunning.* Did you ever see him write?

*Mr. Dennis.* I have seen him write, but not often.

*Mr. Dunning.* Look at that Hand-writing; tell me whether you believe the Two Entries in the First Page of that Book are his Hand-writing?

*Mr. Dennis.* Yes, particularly his Name, *Thomas Amis*, seems very much so.

*Mr. Dunning.* Do you believe it to be his Hand-writing?

*Mr. Dennis.* I believe the Whole to be his Hand-writing.

*Ordered to withdraw.*

*Mr. Dunning.* I do not know whether, on the Part of the Prisoner, they mean to put us on the proving, which it is necessary for us to do if they require it, the Marriage with the Duke of *Kingston*.

*Mr. Wallace.* We are ready to admit that Fact. There is no Doubt of her being married by the Licence of the Archbishop of *Canterbury*.

*Mr. Dunning.* You will give us the Date.

*Mr. Wallace.* Mention what the Day is.

*Mr. Dunning.* The 8th of *March* 1769, I understand.

*Mr. Dunning.* My Lords, We are now going to prove a Caveat, entered by the Lady, upon the Apprehension of a Suit intended to be instituted by Mr. *Hervey* in the Spiritual Court.

*Mr. JAMES, who was sworn in like Manner.*

*Mr. Dunning.* Do you know any Thing of the Caveat entered at *Doctors Commons* on the Part of the Lady at the Bar?

*Mr. James.* Yes, the Caveat is entered in this Book (*producing it*).

*Mr. Dunning.* Is that the proper Book, in which such Entries ought to be made?

*Mr. James.* It is.

*The Caveat was read by the Clerk, and is as follows: "The 18th of August 1768.*

*"Let no Citation, Intimation, or other Process, or any Letters of Request for the*

*"same, to any other Judge or Jurisdiction whatsoever, issue under the Seal of this*

*"Court at the Suit or Instance of the Honorable Augustus John Hervey, or his*

*"Brother, against the Honorable Elizabeth Chudleigh, Spinster, of any Cause or*

*"Suit Matrimonial, without due Notice being given to Mr. Nathaniel Bishop,*

*"Proctor for the said Honorable Elizabeth Chudleigh, who, on his being warned*

*"thereto before the Judge of this Court, or his lawful Surrogate, will be ready by*

*"himself or Counsel to shew just Cause of this same Caveat, and why no such*

*"Process or Letters of Request should issue thereupon."*

*Mr. Wallace.* The Witness merely produces the Book; he knows nothing of the Fact of the Entry being made?

*Mr. James.* I know Mr. *Bishop's* Clerk's Hand; this is his Hand-writing.

*Mr. Dunning.* Perhaps the Witness may know, that Mr. *Bishop* was the Proctor employed by the Lady in the Course of that Suit?

*Mr. James.* I have heard so.

*Mr. Attorney General.* That appears on the Record they have put in.

*Mr. Dunning.* I understand, that it is the Pleasure of some of your Lordships, that we should go into the Proof of the Marriage of the Duke of *Kingston*?

*Mr. Wallace.* It is admitted on the Part of the Prisoner.

*Mr. Dunning.* But as some of the Lords wish for the Proof, we will examine it.

*The Reverend Mr. JAMES TREBECK, who was sworn in like Manner.*

*Mr. Dunning.* Be so good as find the Register of the Marriage of the Duke of *Kingston*.



*Points it out; Clerk reads.* “ N<sup>o</sup> 92. Marriages in *March* 1769. N<sup>o</sup> 92. The most noble *Evelyn Pierrepont*, Duke of *Kingston*, a Batchelor, and the Honorable *Elizabeth Chudleigh* of *Knightsbridge*, in *St. Margaret’s, Westminster*, a Spinster, were married by Special Licence of the Archbishop of *Canterbury* this 8th of *March* 1769, by me *Samuel Harpur* of the *British Museum*. This Marriage was solemnized between us,

“ KINGSTON,  
“ ELIZABETH CHUDLEIGH.”

In the Presence of

“ MASHAM,	J. ROSS MACKYE,
“ WILLIAM YEO,	E. R. A. LAROCHE,
“ A. K. F. GILBERT,	ARTHUR COLLIER,
“ JAMES LAROCHE JUN.	C. MASHAM.”
“ ALICE YEO,	

*Mr. Dunning.* I am desired to apprise your Lordships of a Fact, which may or may not be proved if thought necessary. Your Lordships have heard in the Evidence of the last Woman an Account of a certain *Mr. Spearing*, who was present. That *Mr. Spearing* could not be found; he, though Mayor of *Winchester*, is now found to be amusing himself some where or other beyond Sea, God knows where. We have Witnessess to give your Lordships that Account, if your Lordships think it necessary.—Will your Lordships now please to hear the Reverend *Mr. Harpur*?

*The Reverend Mr. HARPUR, who was sworn in like Manner.*

*Mr. Dunning.* Did you perform the Marriage Ceremony between these Parties?

*Mr. Harpur.* Yes.

*Mr. Dunning.* At the Time mentioned in the Register?

*Mr. Harpur.* Yes.

*Lord High Steward.* Have you any more Witnessess to produce?

*Mr. Dunning.* We don’t judge it necessary to offer to your Lordships any more Evidence in this Stage of the Business. If it should become so, we reserve to ourselves the Right of examining them hereafter.

*Mr. Wallace.* I beg *Mrs. Phillips* may be called to the Bar, that a Letter may be produced to her, and that she may say whether it is her Hand writing.

*Mrs. PHILLIPS called.*

*Mr. Wallace.* Is that your Hand-writing?

*Mrs. Phillips.* The Name is my Hand-writing.

*Mr. Wallace.* Is that your Letter?

*Mrs. Phillips.* It is my Letter.

A LETTER from JUDITH PHILLIPS to her Grace the Duchess of KINGSTON read.

“ MY LADY DUCHESS,

“ I write your Grace this Letter.—My Heart has ever been firmly attached to your Grace’s Interest and Pleasure, and my utmost Wish to deserve your Favour and Countenance. Suffer me not then in my declining Years to think I have forfeited that Favour and Protection, without intentionally giving the most distant Cause.

“ May I intreat your Grace to accept this as a *sincere and humble Submission* for any Failure of Respect and Duty to your Grace; and permit me most humbly to intreat your Grace’s *kind Intercession* with my Lord Duke to *continue* *Mr. Phillips* his Steward, whose Happiness consists only in acting and discharging his Duty to his Grace’s Pleasure. This additional Mark of your Grace’s Goodness we hope to be happy in; and in Return, the Remainder of our Lives shall be passed in Gratitude and Duty. The Person who carries this will wait to receive your Grace’s Pleasure and Commands to her, who remains, with the greatest Respect,

“ My LADY DUCHESS,

“ Your Grace’s most dutiful Servant,

“ *November 7, 1771.*

“ J. PHILLIPS.”

*Mr.*



*Mr. Attorney General.* The Evidence, your Lordships will recollect, given by the Witness was in Answer to a Question, Whether her Husband had or had not been *turned out of his Place?* pointing the Question so as to give your Lordships, and to give the Witness to understand, that they meant the Circumstance of being *turned out of his Place* should go personally to the Discredit of her Husband, and also imply some Memory of that in the Mind of the Wife. The Witness, in Answer to that, told your Lordships, with respect to such Part of it as might be deemed to relate to her Husband's Credit in the Business, that he had resigned his Place under the Duke. The Letters which I have in my Hand, and will just state to your Lordships, if it be thought necessary before the Calling of the Witness, is that very Correspondence, by which it appears that he did so resign his Employment under his Grace into his Grace's Hands. He wrote to his Grace at *Newmarket* from *Holm Pierrepont*. The Letter is dated the "17th of October 1771." And he writes thus:

"I have ever done my Duty with the strictest Regard to your Grace's Interest, and with the most perfect Respect. I have declined accepting a good Settlement, to act conformable to your Grace's Pleasure, which her Grace was pleased to promise should be made up to me, which must have escaped her Grace's Memory, as I have since had my Rent considerably raised, and am much concerned to observe lately your Grace's Displeasure; and being conscious of a faithful Discharge of my Duty, I must be unjustly represented to your Grace. I hope your Grace will be pleased to permit my delivering up the Charge of your Grace's Affairs, which, as an honest Man, I can only properly keep, while satisfied myself, and honoured with your Grace's Approbation, &c."

In Answer to which he received this Letter:

"Mr. *Phillips*,

"Your Letter came to me at *Newmarket*. After what has passed, there is no Occasion for many Words. *Sherin* will be at *Holm Pierrepont* sometime next Week, with my Orders about settling your Business, which I flatter myself you will readily comply with.

"I am yours, &c. &c."

I believe I may refer to your Lordships Memory, that Mrs. *Phillips* mentioned his Grace's having looked coolly on her Husband, which occasioned his Resignation.

*A Peer.* What is that, Mr. Attorney General, that you have been reading?

*Mr. Attorney General.* The First is a Copy of a Letter to the Duke; the other the Duke's original Answer. If it is thought material enough to trouble your Lordships with it, we can easily prove that this is his Grace's Hand-writing, and this the Copy of his Grace's Letter, which was all that was necessary.

ADJOURNED to MONDAY.

MONDAY, APRIL 22. *The Fifth and last Day.*

THE Lords and others came from the Chamber of Parliament in the customary Order. Proclamation for Silence being made as usual, the Duchess of *Kingston* was conducted to the Bar, when her Grace addressed the Lords in the following Terms:

My Lords,

THIS my respectful Address will, I flatter myself, be favourably accepted by your Lordships; my Words will flow freely from my Heart, adorned simply with Innocence and Truth. My Lords, I have suffered unheard-of Persecutions; my Honour and Fame have been severely attacked; I have been loaded with Reproaches; and such Indignities and Hardships have rendered me the less able to make my Defence before this august Assembly against a Prosecution of so extraordinary a Nature, and so undeserved.

My Lords, With Tenderness consider how difficult is the Task, of myself to speak, nor say too little nor too much: Degraded as I am by Adversaries; my Family despised; the honourable Titles on which I set an inestimable Value, as received from my most noble and



and late dear Husband, attempted to be torn from me. Your Lordships will judge how greatly I stand in need of your Protection and Indulgence.

My Lords, Were I here to plead for Life, for Fortune, no Words from me should beat the Air; the Loss I sustain in my most kind Companion and affectionate Husband, makes the former more than indifferent to me; and, when it shall please Almighty God to call me, I shall willingly lay that Burthen down. I plead before your Lordships for my Fame and Honour.

My Lords, Logic is properly defined, and well represented in this High Court. It is a Talent of the human Mind, and not of the Body, and holds a Key which signifies, that Logic is not a Science itself, but the Key to Science; that Key is your Lordships judicial Capacity and Wisdom. On the Left-hand is represented a Hammer, and before it a Piece of false, and another of pure Gold. The Hammer is your penetrating Judgment, which, by the Mercy of God, will strike hard at false Witnesses who have given Evidence against me, and prove my Intention in this pending Cause as pure as the finest Gold, and as justly distinguished from the Sophistry of Falshood.

My Lords, Your unhappy Prisoner is born of an ancient, not ignoble Family; the Women distinguished for their Virtue, the Men for their Valour, descended in an honourable and uninterrupted Line for Three Centuries and a Half: Sir *John Chudleigh*, the last of my Family, lost his Life at the Siege of *Ostend*, at Eighteen Years of Age, gloriously preferring to die with his Colours in his Bosom, rather than accept of Quarter from a gallant *French* Officer, who, in Compassion to his Youth, Three Times offered him his Life for that Ensign, which was shot through his Heart. A happy Death! that saves the Blush he would now feel for the unheard-of Injuries and Dishonour thrown on his unfortunate Kinswoman, who is now at the Bar of this Right Honourable House.

His Grace the late Duke of *Kingston's* Fortune, of which I now stand possessed, is valuable to me, as it is a Testimony to all the World how high I was in his Esteem. As it is my Pride to have been the Object of Affection of that virtuous Man, so shall it be my Honour to bestow that Fortune to the Honour of him who gave it to me, well knowing, that the wise Disposer of all Things would not have put it in his Heart to prefer me to all others, but that I should be as faithful a Steward, as I was a faithful Wife; and that I should suffer others, more worthy than myself, to share these his great Benefits of Fortune.

My Lords, I now appeal to the Feelings of your own Hearts, whether it is not cruel, that I should be brought as a Criminal to a publick Trial for an Act committed under the Sanction of the Laws.—An Act that was honoured with his Majesty's most gracious Approbation; and previously known and approved of by my Royal Mistress, the late Princess Dowager of *Wales*; and likewise authorized by the Ecclesiastical Jurisdiction; your Lordships will not discredit so respectable a Court, and disgrace those Judges who there so legally and honourably preside. The Judges of the Ecclesiastical Court do not receive their Patents from the Crown, but from the Archbishops or Bishops. Their Jurisdiction is competent in Ecclesiastical Cases, and their Proceedings are conformable to the Laws and Customs of the Land, according to the Testimony of the learned Judge *Blackstone* \* (whose Works are as entertaining as they are instructive) who says, "It must be acknowledged, to the Honour of the Spiritual Courts, that though they continue to this Day to decide many Questions which are properly of Temporal Cognizance, yet Justice is in general so ably and impartially administered in those Tribunals (especially of the superior Kind) and the Boundaries of their Power are now so well known and established, that no material Inconvenience at present arises from their Jurisdiction. And should an Alteration be attempted, great Confusion would probably arise, in overturning long established Forms, new modelling a Course of Proceedings that has now prevailed for Seven Centuries."—And I must here presume to add, as founded on Truth, that that Court (of which his Majesty is the Head) cannot be stopped by any Authority whatsoever, while they act in their own Jurisdiction.—Lord Chief Justice *Hale* says, "where there has been a Sentence of Divorce (which is a Criminal Case) if that Sentence is suspended by an Appeal to the Court of Arches (as a superior Court) and while that Appeal is depending, One of the Parties marries again, the Sentence will be a Justification within the Exception of the Act of Parliament, notwithstanding that the Sentence has been appealed from, and consequently may be reversed by a superior Court." And, my Lords, how much more Reason is there for its coming within the Exception of the Act in my Case, since no Appeal had been made?

My Lords, I earnestly look up to your Lordships for Protection, as being now a Sufferer for having given Credit to the Ecclesiastical Court. I respectfully call upon you, my Lords, to protect the Spiritual Jurisdiction, and all the Benefit of religious Laws, and me, an unhappy



Happy Prisoner, who instituted a Suit of Jactitation upon the Advice of a learned Civilian, who carried on the Prosecution, from which I obtained the Sentence that authorized your Prisoner's Marriage with the most Noble *Evelyn Duke of Kingston*, that Sentence solemnly pronounced by *John Bettsworth*, Doctor of Laws, Vicar General of the Right Reverend Father in God *Richard* by Divine Permission Lord Bishop of *London*, and Official Principal of the Consistorial Court of *London*, the Judge thereof, calling on God, and setting him alone before his Eyes, and hearing Counsel in that Cause, did pronounce, that your Prisoner, then the Honourable *Elizabeth Chudleigh*, now *Elizabeth Dowager Duchess of Kingston*, was free from all matrimonial Contracts or Espousals, as far as to him at that Time appeared, more especially with the said Right Honourable *Augustus John Hervey*.

My Lords, Had this Prosecution been set on foot merely for the Love of Justice, or good Example to the Community, why did they not institute their Prosecution during the Five Years your Prisoner was received and acknowledged the undoubted and unmolested Wife of the late Duke of *Kingston*?

My Lords, The Preamble of the very Act on which I am indicted, plainly and entirely precludes your Prisoner: It runs thus, "Forasmuch as divers evil disposed Persons, being married, run out of one County into another, or into Places where they are not known, and there become to be married, having another Wife or Husband living, to the great Dishonour of God, and utter Undoing of divers honest Mens Children, and others, &c." And as the Preamble has not been considered to be sufficient in my Favour to impede the Trial, I beg Leave to observe how much your Prisoner suffers by being produced before this Noble House, on the Penalty of an Act of Parliament, without benefiting by the Preamble, which is supposed to contain the whole Substance, Extent, and Meaning of the Act.

My Lords, Upon your wise Result on my unhappy Case, you will bear in your willing Remembrance, that the Orphan and Widow is your peculiar Care; and that you will be tender of the Honour of your late Brother Peer, and see in me his Widow and Representative, recollecting how easy it may be for a next of Kin to prosecute the Widows or the Daughters, not only of every Peer, but of every Subject of *Great Britain*, if it can be affected by the Oath of one superannuated and interested old Woman, who declared Seven Years ago that she was incapable of given Evidence thereon, as will appear in Proof before your Lordships. And I may further observe to your Lordships, that my Case is clearly within the Proviso of the Statute on which I am indicted. In the Third Clause, it is "provided that this Act shall not extend to any Person, where the former Marriage hath been, or hereafter shall be, declared by Sentence of the Ecclesiastical Court to be void, and of no Effect."

If there is supposed to have been a former Marriage, the same must have been a true Marriage, or a false one. If a true one, it cannot be declared void; and if a false one, or the Semblance of one only, then only, and No otherwise, is it that it can be declared void.——Therefore must this Proviso have respect to pretended Marriages only, and to none other, and such only it is, that can be the Objects of Causes of Jactitation, the Sentence in which is a more effectual Divorce and Separation of the Parties, than many Divorces which have been determined to fall within this Proviso.——The Crime charged in the Indictment was not a Felony, or even a Temporal Offence, until the Act of *James the First*; till then, it was only cognizable in the Ecclesiastical Court; and though an Indictment could lie for a slight Blow, yet the Common Law did not allow of a Criminal Prosecution for Polygamy until that Period; so that if the Case comes within the Exception of the only Statute upon that Subject, it is no Offence at all; and Dr. *Sherlock*, Bishop of *London*, has said, in such Cases the Law of the Land is the Law of God.

My Lords, I have observed, that I had greatly suffered in Fame and Fortune by the Reports of Mr. *Hervey*; and I beg Leave to mention in what Manner: Your Prisoner was at that Time possessed of a small Estate in the County of *Devon*, where Sir *George Chudleigh*, her Father's eldest Brother, had large Possessions: The Purchase of that Estate was much solicited in that County; and having frequent Opportunities to dispose of it, it was ever made an insuperable Objection by the intended Purchaser, that I could not make a clear Title to the Estate on account of Mr. *Hervey's* Claim to your Prisoner as his Wife.

And your Prisoner being also possessed of building Lands for a great Number of Years, for the same Reasons she never had the Ground covered (valued at 1,200*l. per Annum*). And as your Prisoner's Health declined, and made it necessary for her to seek Relief in foreign Climes (which increased her Expences beyond what her Circumstances could support) and her little Fortune daily decreased by Money taken up on Mortgage and Bond, as will appear by the Evidence of Mr. *Drummond*; her Royal Mistrets likewise in the Decline of Life,



whose Death would probably have deprived her of 400*l.* a Year; the Persecutions threatened on Mr. *Hervey's* Side presented but a gloomy Prospect for her declining Life; your Prisoner was induced, as she before observed to your Lordships, to follow the Advice of Doctor *Collier*, and instituted the Suit of Jactitation, your Prisoner subscribing entirely to his Opinion; and following his Advice and Instructions, which she presumes alone is a full Defence against the Charge of Felony; for your Lordships in your great Candour cannot think, that a Lady can know more of the Civil Law, than her learned Civilians could point out to her.

And as a criminal and felonious Intent is necessary to constitute the Offence with which I stand charged, certainly I cannot be guilty in following the Advice I received, and in doing what in my Conscience I thought an authorized and innocent Act.

My Lords, Though I am aware, that any Person can prosecute for the Crown for an Offence against an Act of Parliament, yet I will venture to say, that few Instances, if any, have been carried into Execution without the Consent of the Party injured; and with great Deference to your Lordships Judgment I venture to declare, that in the present Case no Person whatever has been injured, unless your Lordships Candour will permit me to say that I am injured, being now the Object of the undeserved Repentment of my Enemies. It is plain to all the World that his Grace the Duke of *Kingston* did not think himself injured, when in the short Space of Five Years his Grace made Three Wills, each succeeding one more favourable to your Prisoner than the other, giving the most generous and incontestable Proof of his Affection and Solitude for my Comfort and Dignity; and it is more than probable, my Lords, from the well-known mutual Friendship subsisting between us, that had I been interested, I might have obtained the Bulk of his Fortune for my own Family; but I respected his Honour, I loved his Virtues, and had rather have forfeited my Life than have used any undue Influence to injure the Family; and though it has been industriously and cruelly circulated, with a View to prejudice me, that the First-born of the late Duke's Sister was deprived of the Succession to his Grace's Fortune by my Influence, the Wills, my Lords, made in Three distant Periods, each excluding him, demonstrate the Calumny of these Reports.

I must further observe to your Lordships, in Opposition to the Charge against me of Interestedness, that had I possessed or exercised that undue Influence with which I am charged by the Prosecutor, I might have obtained more than a Life-interest in the Duke's Fortune; and though from the Affection I bear to the Memory of my late much honoured Husband, I have forborne to mention the Reason of his disinheriting his eldest Nephew, yet *Charles* the Second Son, with his Heirs, appear immediately after me in Succession, *William* and his Heirs follow next, after him *Edward* and his Heirs, and the unfortunate *Thomas*, Lady *Frances's* youngest Son, is not excluded, though labouring under the Infirmities of Childhood at the Age of Manhood, and not able to support himself. For the late Noble Duke of *Kingston* repeatedly mentioned to your Prisoner, "I have not excluded him, for he has never "offended; and who can say God cannot restore him? who can say that God will not restore "him to Health?" My Lords, that good Man did Honour to the Peerage, Honour to his Country, Honour to human Nature.

His Grace the most Noble Duke of *Newcastle* appeared with the Will, which had been intrusted to his Grace for Four Years by his late dear Friend. In Honour to the Lady *Frances Meadows* the Prosecutor was requested to attend at the Opening of the Will; he retired with Displeasure, disappointed that his eldest Son was disinherited, and unthankful, though the Duke's Fortune still centered in his Four youngest Sons and their Posterity.

My Lords, Worn down by Sorrow, and in a wretched State of Health, I quitted *England* without a Wish for that Life which I was obliged by the Laws of God and Nature to endeavour to preserve; for your Prisoner can with great Truth say, that Sorrow had bent her Mind to a perfect Resignation to the Will of Providence. And, my Lords, while your unhappy Prisoner was endeavoring to re-establish her greatly impaired Health abroad, my Prosecutor filed a Bill in Chancery upon the most unjust and dishonourable Motives. Your Prisoner does not complain of his endeavouring to establish a Right to himself; but she does complain of his forming a Plea on dishonourable and unjust Opinions of his late noble Relation and generous Benefactor, to the Prejudice and Discredit of his much afflicted Widow; and not satisfied with this Prosecution, as a Bulwark for his Suit in Chancery, he cruelly instituted a Criminal Prosecution, in Hopes, by a Conviction in a Criminal Cause, to establish a Civil Claim, a Proceeding discountenanced by the Opinion of the late Lord *Northington*.

My Lords, I have heretofore forborne, from the great Love and Affection to my late Noble Lord, to mention what were the real Motives that induced his Grace to disinherit his eldest Nephew; and when my Plea and Answer in Chancery were to be argued, I particularly



ticularly requested of the Counsel to abstain from any Reflections upon my Adversaries, which the Nature of their Prosecutions too much deserved, and grieved I am now, that I must no longer conceal them. For as Self-preservation is the First Law of Nature, and as I am more and more persecuted in my Fortune and my Fame, and my Enemies hand about Pocket-evidence to injure me in every Company, and with double Tongues they sting me to the Heart, I am reduced to the sad Necessity of saying, that the late Duke of *Kingston* was made acquainted with the fatal Cruelty, with which Mr. *Evelyn Meadows* treated an unfortunate Lady, who was as amiable as she was virtuous and beautiful; to cover which Offence, he most ungratefully and falsely declared, that he broke his Engagements with her for fear of disobliging the Duke, which he has often been heard to say. This, with his Cruelty to his Sister and Mother, and an Attempt to quit actual Service in the late War, highly offended the Duke; and it would be difficult for him, or his Father, to boast of the least friendly Intercourse with his Grace for upwards of Eighteen Years.

My Lords, In a dangerous State of Health, when my Life was despaired of, I received a Letter from my Solicitor, acquainting me, that if I did not return to *England* to put in an Answer to the Bill in Chancery within Twenty-one Days, I should have Receivers put into my Estates; and also, that if in Contempt of the Indictment I did not return, I should be outlawed. It clearly appeared to me, my Lords, as I make no Doubt it does to your Lordships, that if in the Inclemency of the Weather I risked to pass the *Alps*, my Life would probably be endangered, and the Family would immediately enter into Possession of the real Estates; and if Female Fears should prevail, that I should be outlawed. Thus was I to be deprived of Life and Fortune under Colour of Law; and that I might not return to these persecuting Summonses, by some undue and cruel Proceedings my Credit was stopped by my Banker for £.4,000, when there remained an open Account of £.75,000, and at that Instant upwards of £.6000 was in his Hands, my Revenues being constantly paid into his Shop to my Credit. Thus was I commanded to return Home at the manifest Risque of my Life, and at the same Time every Art used to deprive me of the Means of returning for my Justification. Conscious of the perfect Innocence of my Intention, and convinced that the Laws of this Country could not be so inconsistent as to authorize an Act, and then defame and degrade me for having obeyed it, I left *Italy* at the Hazard of my Life: It was not for Property I returned, but to prove myself an honourable Woman. Grant me, my Lords, but your good Opinion, and that I stand justified in the Innocence of my Intention, and you can deprive me of nothing that I value, even if you should take from me all my worldly Possessions; for I have rested on that Seat where the poor blind *Belisarius* is said to have asked Charity of every Passenger, after having conquered the *Goths* and *Vandals*, *Africans* and *Persians*, and would do the same without murmuring, if you would pronounce me, what I hope your Lordships will cheerfully subscribe to—that I am an honourable Woman.

My Lords, Your late Brother, the truly honourable Duke of *Kingston*, whose Life was adorned by every Virtue and every Grace, does not his most respectable Character plead my Cause and prove my Innocence?

My Lords, The Evidence of the Fact of a supposed clandestine Marriage with Mr. *Hervey* depends entirely upon the Testimony of *Ann Cradock*.

I am persuaded your Lordships, from the Manner in which she gave her Evidence, already entertain great Suspicions of the Veracity of her Testimony. She pretends to speak to a Marriage Ceremony being performed, at which she was not asked to be present, nor can she assign any Reason for her being there.—She relates a Conduct in Mrs. *Hanmer*, who she pretends was present at the Ceremony, inconsistent with a real Marriage; she acknowledges that she was in or about *London* during the Jactitation Suit, and that Mr. *Hervey* applied to her on that Occasion, and swears that she then and ever had a perfect Remembrance of the Marriage, and was ready to have proved it, had she been called upon, and never declared to any Person that she had not a perfect Memory of the Marriage, and that she never was desired either to give or with-hold her Evidence; and from Mr. *Hervey's* not calling on this Woman, it is insinuated he abstained from the Proof by Collusion with me. She also swears, that I offered to make her an Allowance of Twenty Guineas a Year, provided she would reside in either of the Three Counties she has mentioned, but acknowledges she has received no Allowance from me. Can your Lordships believe, that if I could have been weak enough to have instituted the Suit, with a Conviction in my own Mind of a real lawful Marriage between Mr. *Hervey* and myself, that I would not, at any Expence, have taken Care to have put that Woman out of the Way? But, my Lords, I trust that your Lordships will be perfectly satisfied, that great Part of the Evidence of this Woman is made for the Purpose of the Prosecution; though she has denied she has any Expectation from the Event, or ever

declared



declared so, yet it will be proved to your Lordships, that her future Provision (as she has declared) depends upon it: And notwithstanding she has now brought herself up to swear that she heard the Ceremony of Marriage performed, yet it will be proved that she has declared, she did not hear it; and it will be further proved to your Lordships, that Mr. *Hervey* was extremely solicitous to have established a legal Marriage with me for the Purpose mentioned by Mr. *Hawkins*, and that this Woman was actually applied to and declared to Mr. *Hervey's* Solicitor, that her Memory was impaired, and that she had not any Recollection of it, which was the Reason why she was not called as a Witness.

My Lords, If she is thus contradicted in these Particulars, and appears under the Influence of Expectations from this Event of the Prosecution, your Lordships will not credit her Evidence, that the complete Ceremony of Marriage was performed, or any other Particulars which rest upon her Evidence.

My Lords, With respect to what your Lordships have heard from the Witnesses, of my Desire at Times to be considered as the Wife of Mr. *Hervey*, your Lordships in your Candour will naturally account for that Circumstance, after the unfortunate Connection that had subsisted between us.

My Lords, I call God Almighty, the Searcher of Hearts, to witness, that at the Time of my Marriage with the Duke of *Kingston*, I had, myself, the most perfect Conviction that it was lawful. That noble Duke, to whom every Passage of my Life had been disclosed, and whose Affection for me, as well as Regard for his own Honour, would never have suffered him to have married me, had he not as well as myself received the most solemn Assurances from Doctor *Collier*, that the Sentence, which had been pronounced in the Ecclesiastical Court, was absolutely final and conclusive, and that I was perfectly at Liberty to marry any other Person. If therefore I have offended against the Letter of the Act, I have so offended without criminal Intention. Where such Intention does not exist, your Lordships Justice and Humanity will tell you there can be no Crime; and your Lordships, looking on my distressed Situation with an indulgent Eye, will pity me as an unfortunate Woman, deceived and misled by erroneous Notions of Law, of the Propriety of which it was impossible for me to judge.

My Lords, Before I take my Leave, permit me to express my warm and grateful Sense of the Candour and Indulgence of your Lordships, which have given me the firmest Confidence that I shall not be deemed criminal by your Lordships for an Act, in which I had not the least Suspicion that there was any Thing illegal or immoral.

My Lords, I have lost, or mislaid, a Paper, where I had put together my Ideas to present to your Lordships. The Purport was to tell your Lordships, that my Advocate Doctor *Collier*, who instituted this Suit of Jactitation, is now in a dangerous State of Health; he has had Two Physicians to attend him, by my Order, Yesterday, to insist and order his Attendance to acquaint your Lordships, that I acted entirely under his Directions; that it was by his Advice I married his Grace the Duke of *Kingston*, assuring me that it was lawful; that he had the Honour of going to his Grace the Archbishop of *Canterbury* to obtain a Licence, and to explain every Part that regarded the Cause; that his Grace was so just, so pious, and so good, as to take Time to consider whether he would grant us a special Licence for the Marriage: After mature Consideration and Consultation with great and honourable Persons in the Law, he returned the Licence to Doctor *Collier*, with full Permission for our Marriage. Doctor *Collier* was present at the Marriage; Doctor *Collier* signed the Register of St. *George's* Church. Mr. *La Roche* has frequently attended the Duke of *Kingston* to Doctor *Collier*, where he heard him consult the Doctor if the Marriage would be lawful; he said it would, and never could be controverted.

Under these Circumstances, I wished to bring my Advocate forth to protect me. He, my Lords, is willing to make an Affidavit, to be examined by the Enemy's Counsel, to submit to any Thing that your Lordships can command, willing to justify his Conduct; but he has had the Misfortune, my Lords, ever since the latter End of *August*, or the First Week in *September*, I do not well remember which, never to have been in Bed. I apprehended, from seeing him Yesterday, with your Lordships Indulgence, that he had the St. *Anthony's* Fire; but my Physicians, who have been with him, can give a better Account, if you will permit them, of the State of his Health, that your Lordships may not imagine that he keeps back, or that I am afraid to produce him. If it is not to avail me in Law, I ask no Favour; but I petition your Lordships, and would, upon my Knees, that you will hear the Evidence that he will give to the Justification of my Honour, though it does not avail me in Law.



My Lords, I do request that Doctor *Collier* may be examined in the strictest Manner, and by every Enemy that I have in the World. My Physicians saw him last Night, and they can, previous to his Examination, inform your Lordships in what State they apprehend him to be.

*Lord Ravensworth.* After what I have just heard from the Prisoner at the Bar, it is impossible not to feel equally with the Rest of your Lordships: And, my Lords, what came last from the Prisoner at the Bar I own strikes me with the Necessity of Permission being given, if it could be done, to have Doctor *Collier* examined.

*Lord Camden.* I am really, my Lords, at some Loss to know, upon what Ground it is your Lordships stand at this Moment with respect to the Evidence of Doctor *Collier*. I do not understand yet, that Doctor *Collier* is called by the Prisoner or by her Counsel. I do not yet understand, that in Consideration of the infirm State of his Health the Prisoner or her Counsel do require from your Lordships any specific particular Mode of Examination, by which your Lordships might be apprised of the Substance of his Evidence. I understand neither of these Things to be moved to your Lordships; if they were, Matter of Debate on either one or the other might probably arise, and then this is not the Place for your Lordships to enter into a Consideration of it. With regard to the Case itself, which the noble Prisoner has made for one of her most material Witnesses, it is undoubtedly such as would touch your Lordships with a proper Degree of Compassion, as far as the Justice of the Court can go, and your Feelings are able indulge; beyond that it is impossible, let your Lordships Desire be what it may: For you to transgress the Law of the Land, or to go beyond the Rules prescribed by those Laws, is impossible. A Witness so infirm that he is totally incapable of Attendance! your Lordships, if you are to lose his Evidence, will lament the Want of it: Justice cannot be so perfect and complete without the Examination of a necessary and material Witness, as if you had it; but if a greater Evil than that should happen (and it has frequently happened in the Course of Causes) which is Death itself, which shuts up the Mouth in everlasting Silence, if this should arrest the Witness before he could be produced, his Evidence is lost for ever. If this Witness should by his Infirmary be totally unable to attend whilst this Cause lasts, I am sorry to say your Lordships must go on without him; it is impossible to wait until that Witness can be produced: While the Cause lasts (and your Lordships will precipitate nothing in the Course of Justice) if he can be brought, you will make every Accommodation to receive him, you will take every Means in your Power to make the Attendance safe and convenient for him, you will receive him in any Part of the Cause, even at the last Moment before it is concluded. So far your Lordships may go; beyond that, I doubt, you cannot. But, my Lords, I have now been speaking without a Question, without a Motion, without any Thing demanded of your Lordships by the Prisoner or by her Counsel.

*Lord Ravensworth.* I would beg Leave to put it to those noble Lords who sit upon the Bench, Whether there ever was an Instance in a Criminal Cause of a Witness being examined otherwise than in open Court?

*Lord Camden.* The noble Lord is pleased to put a Question particularly pointed to such of your Lordships as have been educated in the Profession of the Law, to know “Whether any Instance can be produced where a Witness, not attending at your Bar to be examined *viva Voce*, has been permitted, by Commission, by Delegation, or any other Manner whatsoever, to give his Evidence out of Court, so that that Evidence, so given out of Court, might be reported into the Court, and stand as Evidence on the Trial?” I presume that is the Point, in which the noble Lord desires to know if any Precedent can be produced. When that Question is asked, and the Answer is to be a Negative, your Lordships easily conceive how much the Modesty of the Answerer is to be affected, if he gives a full, a positive, and a round Negative to that Question. I therefore beg to be understood as confining the Answer to my own Knowledge. Within the Course of my own Practice and Experience I never did know of such an Instance; I never have, to the best of my Memory, read of such an Instance; I never heard of such an Instance; I speak in the Presence of those who are better versed in this Kind of Knowledge than myself; I speak before the Law of the Land, which is now upon your Lordships Wool-sacks. My Lords, if any such Case occurs to them, it will be easy for your Lordships to apply to them; I know of no such, and if I might add briefly One Word on the Subject, I hope I shall never see such an Instance so long as I live in this World. What, my Lords! to give up, and to part with, that noble Privilege in the Mode of open Trial, of Examinations of Witnesses *viva Voce* at your Bar, with a Cross Examination to confront them in the Eye of the World, and to transfer



that to a private Chamber on a few written Interrogatories! I go too far in arguing the Point: I never knew an Instance; I am in the Judgment of the House, and of the learned Judges that hear me; if there ever was an Instance, let it be produced, and in God's Name let Justice be done.

The Lords then proceeded to hear the Witnesses.

*Lord High Steward.* Mr. *Wallace*, you may proceed to call your Witnesses.

*Mr. Wallace.* The First Witness I would call is

*Mr. BERKLEY*, who was sworn in like Manner.

*Mr. Berkley.* My Lords, What Knowledge I had of this Business arose from my being Attorney to Lord *Bristol*, and I must leave it to your Lordships, whether I ought to be examined as being Attorney for Lord *Bristol* consistent with Honour to myself and the Duty I owe to him.

*Mr. Wallace.* I know the Delicacy of the Situation of an Attorney: I merely call Mr. *Berkley* to what passed between him and Mrs. *Cradock*, being sent to get her to attend and prove the Marriage.

*Lord Mansfield.* With regard to the Demurrer put in by Mr. *Berkley* to the Question that is asked him, when they make him a Witness, they subject him to Cross Examinations; but the Point is, whether he, as being concerned as Solicitor for my Lord *Bristol*, can demur to the Question put to him to know, what this Woman said when he went to desire her to come to give Evidence? and as to that, there seems to be no Colour to the Demurrer; for the Protection of Attorneys is as to what is revealed to them by their Client, in order to take their Advice or Instruction with regard to their Defence. This is no Secret of the Client, but is to a collateral Fact, what a Party said to him upon such an Application; and it has been often determined, that as to Fact an Attorney or Counsel has no Privilege to withhold his Evidence if there is a Doubt; even if he swears to an Answer in Chancery, he cannot protect himself from swearing, whether that is his Client's Hand or not, or to his having sworn it, or the Execution of a Deed; it does not come within the Objection to an Attorney revealing the Secrets of his Client. I suppose it is only mentioned to your Lordships for a Justification. If none of your Lordships are of a different Opinion, it will save Time, and the Witness will understand it to be the Opinion of all your Lordships.

*Mr. Wallace.* I beg to know, whether you ever made any Application to Mrs. *Cradock* relative to her being a Witness to the Marriage?

*Mr. Berkley.* I did.

*Mr. Wallace.* At what Time?

*Mr. Berkley.* It was after my Lord *Bristol* was served with a Citation to Doctors Commons.

*Mr. Wallace.* For what Purpose did you apply to her?

*Mr. Berkley.* To know, what she knew relative to the Marriage between Lord *Bristol* and Miss *Chudleigh*.

*Mr. Wallace.* What Answer did Mrs. *Cradock* give to that?

*Mr. Berkley.* My Lord *Bristol* was present. She said she was very old, very infirm, and the Transaction happened many Years ago, and she could not at that Distance of Time remember any Thing of the Matter; upon which my Lord *Bristol* seemed vastly surprized, and said, How can you say so? or to that Effect.

*Mr. Wallace.* Did she persist in not remembering any Thing of the Transaction?

*Mr. Berkley.* She did, and said she remembered nothing of the Matter; and that was the only Time I ever saw her.

*Mr. Wallace.* My Lords, I shall ask Mr. *Berkley* no more Questions.

*Mr. Attorney General.* Was you sent to her as a Person that was present at the Marriage?

*Mr. Berkley.* I was employed in order to collect Evidence from different People, whom my Lord *Bristol* directed me to go to, and other People, with respect to the Marriage, as his Lordship wanted to have a Divorce; and in that Way I saw Mrs. *Cradock*.

*Mr. Attorney General.* Did Lord *Bristol* explain his Want of a Divorce at the Time he sent you to the Witness?

*Mr. Berkley.* The Direction I had from my Lord was in May 1768.

*Mr.*



*Mr. Attorney General.* Was it at that Time, that my Lord *Bristol* told you he wanted a Divorce ?

*Mr. Berkley.* It was.

*Mr. Attorney General.* What you have said was after the Citation ?

*Mr. Berkley.* When I saw the Witness, as well as I remember, it was after the Citation.

*Mr. Attorney General.* Did Lord *Bristol* describe the Witness to you as present at the Marriage ?

*Mr. Berkley.* He did. My Lord said, that she could prove the Marriage.

*Mr. Attorney General.* When Lord *Bristol* expressed himself surprized at that Disappointment, did he then express to you, that she was One of those present at the Marriage ?

*Mr. Berkley.* I do not know that my Lord did.

*Mr. Attorney General.* Was she never represented to you, as a Person present at the Marriage ?

*Mr. Berkley.* I understood, as she was represented to me, that she was present at the Marriage.

*Mr. Attorney General.* Was her Husband, Mr. *Cradock*, ever represented as being present at that Marriage ?

*Mr. Berkley.* Mr. *Cradock* has often told me, that he was not.

*Mr. Attorney General.* The Question that I mean to put upon that is, why was the Husband called who was not present at the Marriage, and the Wife not called who was represented to be present at the Marriage ?

*Mr. Berkley.* I know nothing of that; it went out of my Hands afterwards to Doctors Commons.

*Mr. Attorney General.* Did you decline that Part of the Business in respect to Doctors Commons.

*Mr. Berkley.* I apprehend, I could not act there.

*Mr. Wallace.* Are you an Attorney or a Proctor ?

*Mr. Berkley.* An Attorney, not a Proctor.

*Ordered to withdraw.*

*Mr. Mansfield.* My Lords, We are now going to call Mrs. *Ann Pritchard* to contradict Part of the Evidence of *Ann Cradock*. We beg the Clerk may read the Part alluded to.

*The Clerk of the Parliament was ordered to read that Part of the Evidence, but not having taken it down, Mr. Gurney was ordered to produce his Notes. When they were produced, the Part alluded to could not be found; and*

*Mr. Mansfield* addressed himself to the Lords thus: This Witness, *Ann Pritchard*, is called to contradict Mrs. *Cradock*. In the First Place, to prove that she has told this Mrs. *Pritchard*, that she had some Expectations of Advantage from this Prosecution; and likewise, that she did tell this Witness, that she did not hear any Part of the Ceremony read at the Time, when she said the Lady at the Bar and Lord *Bristol* were married, though she has repeatedly told your Lordships that she had no View of Advantage from this Cause, and that she had heard the Whole of the Ceremony read.

ANN PRITCHARD, *who was sworn in like Manner.*

*Mr. Mansfield.* Do you know Mrs. *Cradock* ?

*Ann Pritchard.* Yes.

*Mr. Mansfield.* Have you ever had any Conversation with Mrs. *Cradock* concerning the reading the Marriage Ceremony between the Lady at the Bar and Lord *Bristol* ?

*Ann Pritchard.* No, I never had.

*Mr. Mansfield.* Did you ever hear Mrs. *Cradock* say any Thing concerning that Ceremony, or her having heard it, or not heard it ?

*Ann Pritchard.* Never, before she was examined.

*Mr. Mansfield.* What do you mean, before she was examined ?

*Ann Pritchard.* Before a Master in Chancery.

*Mr. Mansfield.* When was that ?

*Ann Pritchard.* I cannot particularly say the Time; it was about a Month after I was examined, to the best of my Knowledge.

*Mr. Mansfield.* When was you examined ?

*Ann Pritchard.* I cannot particularly say the Time, when she was examined.

*Mr.*



*Mr. Mansfield.* Can you recollect how many Months ago ?

*Ann Pritchard.* I cannot indeed ; it might be a Year and an Half ago.

*Mr. Mansfield.* What did Mrs. *Cradock* say to you in that Conversation, which she had with you, about her having heard or not having heard the Marriage Ceremony ?

*Ann Pritchard.* She related her Examination before the Master in Chancery concerning her Grace's Marriage.

*Mr. Mansfield.* In that Conversation, did Mrs. *Cradock* say whether she had or had not heard the Marriage Ceremony read ?

*Ann Pritchard.* I never heard her relate any Thing concerning the Marriage Ceremony. I understand the Question now : I did not before. She told me, she did not hear the Marriage Ceremony.

*Lord High Steward.* Let the last Question be asked over again.

*Mr. Mansfield.* Whether Mrs. *Cradock* did or did not say to you, Mrs. *Pritchard*, that she did or did not hear the Marriage Ceremony read ?

*Ann Pritchard.* She told me, she did not hear the Marriage Ceremony read.

*Mr. Mansfield.* Had you any Conversation with Mrs. *Cradock* about any Advantage which she expected from this Prosecution ?

*Ann Pritchard.* I had.

*Mr. Mansfield.* What did Mrs. *Cradock* say to you in that Conversation ?

*Ann Pritchard.* She told me she was to be provided for, but in what Manner she could not say, till after the Affair was over, lest it should be deemed Bribery ?

*Mr. Mansfield.* Did you hear any Thing more said by Mrs. *Cradock* relating to that Subject ?

*Ann Pritchard.* Not at that Time, but at another Time I have.

*Mr. Mansfield.* What did you hear from her at the other Time ?

*Ann Pritchard.* I gave her an Invitation to come to see me. She told me, it would not suit her until this Affair was over ; and then if she should get a good Fortune, she might come and live with me.

*Mr. Mansfield.* Did you hear from Mrs. *Cradock* any Thing said of any particular Provision to be made for her, or any Place to be got ?

*Ann Pritchard.* Her Brother applied to my Husband at the Custom House, desiring him in case he heard of a Vacancy to let him know.

*Mr. Attorney General.* This is not Evidence in the Question now proposed. I know nothing of what will be brought ; but this is not Evidence.

*Mr. Mansfield.* Nothing that passes, unless it comes home to Mrs. *Cradock*, will be Evidence to be sure. The Witness must relate it in her own Manner.

*Mr. Attorney General.* I object to the Witness relating either in her own, or in any other Manner whatever, a Conversation to which Mrs. *Cradock* is not a Party.

*Mr. Mansfield.* It is under an Apprehension that it will come to Mrs. *Cradock*, or it would not be asked.

*Mr. Mansfield.* Did you tell to Mrs. *Cradock* what you heard from her Husband ?

*Ann Pritchard.* I told her myself, that her Brother had been at the Custom House to desire my Husband, when there was a Vacancy in the House, to let him know of it, as Mr. *Meadows* had promised to get him a Place.

*Mr. Mansfield.* What did Mrs. *Cradock* say to you upon your telling her this ?

*Ann Pritchard.* She had never heard any Thing about it.

*Mr. Mansfield.* Did Mrs. *Cradock* say any Thing more to you about this Place ?

*Ann Pritchard.* Her Answer was, it was more than she knew, but that it would be equally the same.

*Mr. Mansfield.* What was meant by being equally the same ?

*Ann Pritchard.* She thought her Brother was to provide for her out of it, or at least allow her something.

*Mr. Attorney General.* How long have you been acquainted with Mrs. *Cradock* ?

*Ann Pritchard.* Five Years.

*Mr. Attorney General.* How long with the Prisoner ?

*Ann Pritchard.* From the 2d of February last.

*Mr. Attorney General.* I wish to know whether any Body was present at any of the Conversations, which you had with Mrs. *Cradock*, but yourself.

*Ann Pritchard.* No.

*Mr. Attorney General.* I wish you would tell where they were ?

*Ann Pritchard.* Once at my own House at *Mile-End*.



*Mr. Attorney General.* At what Time was that Conversation held at your House at Mile-End?

*Ann Pritchard.* It was on a *Sunday*, but I cannot particularly tell the Month.

*Mr. Attorney General.* How long ago was that *Sunday*?

*Ann Pritchard.* It was a very little Time after she had been subpoenaed.

*Mr. Attorney General.* Do you know if it was a Week, or more Time, or less, after she had been subpoenaed?

*Ann Pritchard.* It might be more than a Week. I cannot tell particularly.

*Mr. Attorney General.* What Reason have you to know, that it was within some short Time after she had been subpoenaed?

*Ann Pritchard.* As we were very intimate Acquaintances, she came to dine with me. She told me, she longed to tell me what had happened since the last Time she saw me.

*Mr. Attorney General.* But how long was that last Time she saw you before that last Time that she came to you again?

*Ann Pritchard.* I cannot particularly say.

*Mr. Attorney General.* As near as you can go; was it a Fortnight?

*Ann Pritchard.* It might be a Quarter of a Year.

*Mr. Attorney General.* Have you any Means of recollecting within a Week or a Fortnight of the Time of her having been examined upon the Subpoena?

*Ann Pritchard.* I cannot possibly recollect, as not expecting ever to be called upon.

*Mr. Attorney General.* Does your Intimacy continue with Mrs. *Cradock*?

*Ann Pritchard.* It always did, until she has been confined at Mr. *Beauwater's*.

*Mr. Attorney General.* Did you ever mention this Conversation to Mrs. *Cradock*, since the Time it happened?

*Ann Pritchard.* No, never.

*Mr. Attorney General.* Will you give an Account to their Lordships of the whole Conversation which Mrs. *Cradock* held upon the Subject of that Marriage; whether she told you the whole Story of the Marriage?

*Ann Pritchard.* She told me a great deal of it. I do not know the Particulars.

*Mr. Attorney General.* It is important, that you should recollect as many Particulars as you can, that Mrs. *Cradock* told you of that Marriage. What Particulars did Mrs. *Cradock* tell you of that Marriage?

*Ann Pritchard.* She told me that she had been examined by a Master in Chancery, who asked her if she knew of the Marriage between *Augustus John Hervey* and Miss *Cbudleigh*? They asked her if she was in the Church? she answered, she was. They asked her who was in the Church? she told them, herself, Mr. *Merrill*, and Mrs. *Hanmer*. They asked her, if she heard the Ceremony? she told him, she did not. That was all the Particulars I heard her relate.

*Mr. Attorney General.* Had not you the Curiosity yourself to enquire after some more Particulars?

*Ann Pritchard.* I had not.

*Mr. Attorney General.* Did she ever tell you, at what Time of Night it was?

*Ann Pritchard.* Never.

*Mr. Attorney General.* Was any Body present at the Conversation about the Reward, that the Witnesses expected?

*Ann Pritchard.* No.

*Mr. Attorney General.* At what Time was that Conversation had?

*Ann Cradock.* It was after Dinner, it might be at Two o'Clock on the *Sunday*; it was Summer Time I know, but I cannot particularly say the Month.

*Mr. Attorney General.* Was it the same *Sunday*, that the former Conversation passed?

*Ann Pritchard.* No.

*Mr. Attorney General.* Whether, when the Witnesses proposed, on her having a great Fortune coming to her, that she should live with Mrs. *Cradock*, or Mrs. *Cradock* live with her?

*Ann Pritchard.* Mrs. *Cradock* live with me!

*Mr. Attorney General.* What are you?

*Ann Pritchard.* In a very creditable Situation, and a pretty Fortune. I live at Mile-End.

*Mr. Attorney General.* Do you carry on any Business at Mile-End?

*Ann Pritchard.* No.



*Mr. Attorney General.* Are you married?

*Ann Pritchard.* Yes.

*Mr. Attorney General.* Has your Husband any Business?

*Ann Pritchard.* Yes; a Place in the Custom-House.

*Lord Grosvenor.* What do you mean by Mrs. *Cradock's* being confined at Mr. *Beauwater's*?

*Ann Pritchard.* I went to enquire for her: I was not permitted to see her.

*Lord Denbigh.* I beg to know upon what Account you saw the Prisoner in *February* last?

*Ann Pritchard.* By an Invitation to her House-keeper.

*Lord Denbigh.* Did you see the Prisoner herself at that Time.

*Ann Pritchard.* I did.

*Lord Denbigh.* What passed between you and the Prisoner?

*Ann Pritchard.* I cannot particularly relate it; nothing material.

*Lord Denbigh.* Did nothing pass relative to this Trial?

*Ann Pritchard.* Nothing.

*Lord Denbigh.* Did nothing pass relative to the Conversations between you and Mrs. *Cradock*?

*Ann Pritchard.* I do not recollect there was.

*Lord Weymouth.* I think the Witness has said, that Mrs. *Cradock* told her that she did not hear the Ceremony read; and Mr. *Cradock* has likewise told your Lordships, that she was present when the Ceremony was read; I should be glad to ask whether Mrs. *Cradock* gave any Reason for not having heard the Ceremony? whether, that she was at a Distance in the Church, or the Clergyman did not speak loud enough?

*Ann Pritchard.* She was at too great a Distance in the Church.

*Duke of Richmond.* Did Mrs. *Cradock* tell you, that she had in her Examination before the Master in Chancery said, that she did not hear the Ceremony read?

*Ann Pritchard.* She told me, she did.

*A Lord.* The Counsel may produce that Examination.

*Lord Camden.* I have been asking the same Question, conceiving it would give Light to your Lordships, if it could be produced. I find that it is an Examination *de bene esse*. Publication is not made, and the Examinations are sealed up.

*Ordered to withdraw.*

*Mr. Wallace.* My Lords, I shall call Witnesses now to prove the Consultation of Dr. *Collier*, and I shall follow that, my Lords, with a Proof of what Advice he gave to the noble Lady at the Bar and the Duke of *Kingston* in the Presence of a Witness I have to produce. My Lords, we have sent, but find there is no Possibility of bringing Dr. *Collier*, or he should have been here.—We will now call

Dr. W A R R E N, who was sworn in like Manner.

*Mr. Wallace.* I wish Dr. *Warren* would inform your Lordships, whether he has lately seen Dr. *Collier*.

*Dr. Warren.* I visited Dr. *Collier* Yesterday, about Eight o'Clock in the Afternoon, and found him very ill under a Variety of Complaints, particularly a St. *Anthony's* Fire in his Head and Face, by which One Side of it was so much swelled, that the Eye was almost closed up. It appeared to me that he could not venture out without great Hazard.

*Mr. Attorney General.* I beg Dr. *Warren* may be asked, whether he thinks Dr. *Collier's* Condition such, that he could not stir out without Danger?

*Dr. Warren.* I said so, my Lords.

*Mr. Attorney General.* What Sort of Danger do you mean, when you speak of the Danger under which he would come out?

*Dr. Warren.* I think that he is in Danger; I cannot say that it would certainly kill him, but it would be very imprudent in me to advise him to come out.

*Ordered to withdraw.*

*Mr. Mansfield.* The Witness now intended to be produced to your Lordships is Mr. *Larocke*. The Purpose for which he is to be produced, is to tell your Lordships, that he saw Dr. *Collier* frequently with the Lady at the Bar and the late Duke of *Kingston*, during the Suit in the Ecclesiastical Court: That he has himself heard Dr. *Collier* assure both the Parties, the late Duke of *Kingston* and the Lady at the Bar, after that Sentence in the  
Spiritual



Spiritual Court, That they were perfectly free to marry, and might marry any one they pleased.

*Mr. LAROCHE*, who was sworn in like Manner.

*Mr. Laroche*. Mr. Lords, I did not know, until within these few Minutes, that it would be necessary to call me. I will endeavour to recollect to the best of my Knowledge. I have got some Memorandums in my Pocket, and I hope I may be at Liberty to refer to them.

*Lord High Steward*. Are they in your own Writing?

*Mr. Laroche*. A Copy of it, and it has been in my Possession ever since it was copied.

*A Lord*. Copied by his Desire?

*Mr. Laroche*. Yes, from my own Notes, and in my Presence, and has been in my own Custody ever since.

*Mr. Mansfield*. Did you know the late Duke of *Kingston*? and do you know Dr. *Collier*?

*Mr. Laroche*. Yes, I both knew his Grace the Duke of *Kingston* and Dr. *Collier*.

*Mr. Mansfield*. Was you present at the Marriage of the Lady at the Bar and the Duke of *Kingston*?

*Mr. Laroche*. I was.

*Mr. Mansfield*. Was Dr. *Collier* present also at the Marriage?

*Mr. Laroche*. He was.

*Mr. Mansfield*. Do you know, that Dr. *Collier* was consulted by the Lady at the Bar and the Duke of *Kingston*, while the Suit was depending in the Spiritual Court?

*Mr. Laroche*. I do know, that I have frequently walked with his Grace the Duke of *Kingston* to Doctors Commons in a Morning to Dr. *Collier*. I have gone also with the Duchess in her Coach, and the Duke likewise, to Dr. *Collier*.

*Mr. Mansfield*. Has this happened frequently?

*Mr. Laroche*. Many Times.

*Mr. Mansfield*. Was you ever present with Dr. *Collier* and the Duke of *Kingston* and the Lady at the Bar, after that Sentence had been given in that Court?

*Mr. Laroche*. I was several Times at Dr. *Collier*'s Chambers after the Suit had been determined.

*Mr. Mansfield*. Was you present when Dr. *Collier* gave to the Lady at the Bar, or the late Duke of *Kingston*, or both of them, any Opinion concerning the Effect of that Sentence?

*Mr. Laroche*. I was many Times at Dr. *Collier*'s Chambers, and in Conversation I have heard Dr. *Collier* tell the Duke, That he might with Safety marry the Duchess of *Kingston*, Miss *Cbudleigh*, as she then was.

*Mr. Mansfield*. Have you heard that Opinion, or to that Effect, given more than once?

*Mr. Laroche*. I cannot be exact: I have heard it said from Dr. *Collier* to the Duke.

*Mr. Mansfield*. Have you heard that said also in the Presence of the Lady at the Bar by Dr. *Collier*?

*Mr. Laroche*. I think I have, to the best of my Recollection. I went with the Duke of *Kingston*, I breakfasted with him, as well as I can recollect, the Morning that he was married; we then agreed to dine together at the *Thatched House Tavern*. I went into the City with his Grace first of all to Dr. *Collier*'s to get the Licence. Dr. *Collier*, when we came there was not at home, but was gone to his Grace's House with the Licence in his Pocket.

*Mr. Mansfield*. My Lords, These are all the Questions I have to ask Mr. *Laroche*.

*Mr. Dunning*. My Lords, I should be glad to ask Mr. *Laroche*, what the Occasion was of taking these Opinions of Dr. *Collier*? whether it arose about any Doubt entertained by the Duke or the Lady, or both, whether they were at Liberty to marry?

*Mr. Laroche*. The Duke certainly had a Doubt upon his Breast, until the Suit of Jactitation was over. In consequence of that Sentence, at the Decree of which I was present, and which declared her a single Woman, he applied to Dr. *Collier* to know whether there was any Thing further to go on that might impede his Marriage? he was told, No, that she was a single Woman, and he might marry her.

*Mr. Dunning*. Were these Conversations pending the Suit, or after the Suit was determined?

*Mr.*



*Mr. Laroche.* The last Conversation was after the Suit was over; during the Time of the Suit, I have frequently, I suppose when I was in Town I walked Five Days out of Six into the City with the Duke, and then we called there to know how the Suit went on.

*Mr. Dunning.* Do you recollect, how long the Suit had been determined before the Marriage with the Duke of *Kingston*?

*Mr. Laroche.* I should think, to the best of my Recollection—I believe within Three Weeks. There were Fourteen Days to put in an Appeal; the Appeal was revoked, and I believe they married the Week after.

*Mr. Dunning.* Did the Duke's Doubt continue until the Day of the Marriage?

*Mr. Laroche.* He had no Doubt after he had applied for the Licence, and the Licence had been granted.

*Mr. Dunning.* What was the Occasion of the Conversation, that passed upon the Morning of the Marriage between the Duke and Dr. *Collier*?

*Mr. Laroche.* There was no Conversation upon it as I remember between them upon the Morning of the Marriage.

*Mr. Dunning.* When did Dr. *Collier* inform the Duke, that he might marry?

*Mr. Laroche.* It was, I believe, after the Revocation of the Appeal—but it was after the Sentence was obtained.

*Mr. Dunning.* Will you be so good as to fix the Time as nearly as you can, when both these Conversations passed between Dr. *Collier* and the Duke, and Dr. *Collier* and the Duchefs?

*Mr. Laroche.* As for ascertaining a Time I cannot; but it was from the Meeting of the Parliament in the Month of *October* 1768. If I remember right, it was the Beginning of the Sessions of Parliament before last; and during that Time I used often to walk with the Duke to Dr. *Collier*'s.

*Mr. Dunning.* How many Days was it before the Marriage, if I am mistaken in supposing you said, the Day of the Marriage?

*Mr. Laroche.* It might be Three or Four Days, or within a Week.

*Mr. Dunning.* Do you know, that Dr. *Collier* had been in Fact informed, that there had been a Marriage between the Lady and Mr. *Hervey*?

*Mr. Laroche.* I know nothing at all of that.

*Mr. Dunning.* Was you yourself informed at this Time, that there had been in Fact a Marriage between the Lady and Mr. *Hervey*?

*Mr. Laroche.* I never knew that there had been a Marriage.

*Mr. Dunning.* Had you been so informed, was my Question?

*Mr. Laroche.* From Hear-say, and nothing else; I heard there was a Suspicion of a Marriage, and that she had put him upon the Proof of that Marriage, and that he had failed in his Proof.

*Mr. Dunning.* Had you, or had you not, been informed of the Marriage by the Lady herself?

*Mr. Laroche.* Never.

*Mr. Dunning.* Can you enable their Lordships to judge, what was the Occasion that drew the Duke and Duchefs to make this Application to Dr. *Collier*, so recently before the Marriage, and so long after the Sentence?

*Mr. Laroche.* I suppose, the Meaning of the Duke's going there was to ask Dr. *Collier*, who had the whole Management of the Affair, whether he could with Safety marry the Duchefs.

*Mr. Dunning.* Do you know whether any Body had or had not suggested a Doubt upon the Subject?

*Mr. Laroche.* There had been a Doubt before the Sentence, but after the Sentence there was no Doubt; but still he thought proper to ask him, because there was an Appeal; that Appeal was revoked, and after that Appeal he married.

*Mr. Mansfield.* If your Lordships will permit me, I will ask one Question of Mr. *Laroche*. Whether in the Opinion that Dr. *Collier* gave to the Duke of *Kingston* in his Hearing, Dr. *Collier* founded his Opinion upon the Effect of that Sentence which had passed?

*Mr. Laroche.* He certainly did, in my Conception of the Matter.

*Mr. Dunning.* I should be glad to know, whether the Witnesses meant to have it understood upon what Dr. *Collier* founded his Opinion, that such a Marriage, if it had been lawful, could be set aside by those Proceedings?

*Mr. Laroche.* The Words I heard were these: You may safely marry Miss *Chudleigh*, my Lord, for you neither offend against the Laws of God or Man.



*Lord Fauconbridge.* After this had they any Doubt that they might lawfully marry?

*Mr. Laroche.* After the Sentence pronounced in the Ecclesiastical Court, I am firmly of Opinion, that neither of them had a Doubt as to the Legality of the Marriage.

*Mr. Wallace.* My Lords, I have many Witnesses to prove Facts, which I believe will be admitted by the Gentlemen on the other Side, because they have already been proved in another Place: They are such, as the Lady at the Bar living continually in the State of a single Woman, and transacting in that Character Matters of Consequence relative to Property: They are already contained in Depositions in another Place, and I shall offer to your Lordships now that Sentence which has been pronounced in *Doctors Commons*; the Officer swears he brought it from *Doctors Commons*. Your Lordships are in Possession of it.

*Mr. Attorney General.* I have already stated to your Lordships the Measure, which was observed in giving Evidence in that Case in *Doctors Commons*, both upon one Side and the other; and I stated the Measure observed upon the Part of the Prisoner in *Doctors Commons* to be that of her having given Evidence, that she acted as a single Woman in a great many Transactions.

*Mr. Wallace.* Then, my Lords, I call no more Witnesses.

*Lord High Steward.* Mr. Solicitor General, you will please to reply.

*Mr. Solicitor General.* My Lords, The Custom which has prevailed in Trials at your Lordships Bar, authorizes the Counsel on the Part of the Prosecution to observe upon the Evidence, that has been laid before your Lordships, and to apply that Evidence to the Charge. In the present Case, wishing to discharge my Duty as Counsel in a public Prosecution without the least Degree of unnecessary Severity, or occasioning a momentary Reflection of Pain to the adverse Party who stands at your Lordships Bar; reflecting on the whole Course of the Evidence that has been given; being in my own Mind so clearly convinced as I am, that the Evidence offered in Support of the Prosecution has not in the least Degree been answered by any Evidence, that has been offered in Defence; but, on the contrary, that the Nature of the Defence attempted supports, confirms, and gives Credit to the Charge: I find nothing on which I could with Propriety observe in this Period of the Business at your Lordships Bar, but the Speech which has been made by the Prisoner in Defence. And, I trust, your Lordships will think that it is in no Degree abandoning the Duty I owe unto the Credit and Weight of a public Prosecution, if I decline entering into Observations, in Reply to a mere argumentative Defence, offered to your Lordships by a Prisoner in Person. I therefore hope that your Lordships will think, that I have not failed in my Duty, in declining to Trouble your Lordships any further upon this Matter.

Mr. Solicitor General having finished his Replication on the Part of the Prosecution, the Duchefs of *Kingston* was ordered from the Bar.

The House was then adjourned to the Chamber of Parliament.

The Lords, and others, returned to the Chamber of Parliament in the customary Order, and after some Time, the House was adjourned again into *Westminster-Hall*.

The Peers being seated, the Lord High Steward in his Chair, and the House resumed, the Serjeant at Arms made Proclamation for Silence, as usual.

*Lord High Steward.* Your Lordships have heard the Evidence, and every Thing that has been alledged on both Sides; and you have also heard the Opinion of the learned and reverend Judges upon the Questions stated to them; and the Solemnity of your Proceedings requires that your Lordships Opinions on the Question of GUILTY or NOT GUILTY, should be delivered severally in the Absence of the Prisoner, beginning with the junior Baron; and that the Prisoner should afterwards be acquainted with the Result of those Opinions by me. Is it your Lordships Pleasure to proceed now to give your Opinions upon the Question of GUILTY or NOT GUILTY?

*Lords.* Ay, ay.

Then the Lord High Steward stood up uncovered, and beginning with the youngest Peer said,

*John Lord Sundridge (Duke of Argyle in Scotland).* What says your Lordship? Is the Prisoner GUILTY of the Felony whereof she stands indicted, or NOT GUILTY?



Whereupon *John Lord Sundridge*, standing up in his Place uncovered, and laying his  
 right Hand upon his Breast, answered,  
 GUILTY, upon my Honour.

In like Manner the several Lords aftermentioned, being all that were present, answered as  
 followeth :

*Henry Lord Digby.* Guilty, upon my Honour.  
*Charles Lord Camden.* Guilty, upon my Honour.  
*George Venables Lord Vernon.* Guilty, upon my Honour.  
*Edward Lord Beaulieu.* Guilty, upon my Honour.  
*John James Lord Lovel and Heliand.* Guilty, upon my Honour.  
*Thomas Lord Pelbam.* Guilty, upon my Honour.  
*Frederick Lord Boston.* Guilty, upon my Honour.  
*Nathaniel Lord Scarsdale.* Guilty, upon my Honour.  
*Richard Lord Grosvenor.* Guilty, upon my Honour.  
*William Lord Wycombe.* Guilty, upon my Honour.  
*Thomas Lord Lyttelton.* Guilty, upon my Honour.  
*William Lord Mansfield.* Guilty, upon my Honour.  
*Horatio Lord Walpole.* Guilty, upon my Honour.  
*Thomas Lord Hyde.* Guilty, upon my Honour.  
*Vere Lord Vere.* Guilty, upon my Honour.  
*William Lord Ponsonby.* Guilty, upon my Honour.  
*Andrew Lord Archer.* Guilty, upon my Honour.  
*Henry Lord Ravensworth.* Guilty, upon my Honour.  
*Matthew Lord Fortescue.* Guilty, upon my Honour.  
*Thomas Bruce Lord Bruce.* Guilty, upon my Honour.  
*Edward Lord Sandys.* Guilty, upon my Honour.  
*George Lord Edgecumbe.* Guilty, upon my Honour.  
*Henry Frederick Lord Chedworth.* Guilty, upon my Honour.  
*Francis Lord Godolphin.* Guilty, upon my Honour.  
*Thomas Lord King.* Guilty, upon my Honour.  
*Robert Lord Romney.* Guilty, upon my Honour.  
*Thomas Lord Middleton.* Guilty, upon my Honour.  
*Edmund Lord Boyle.* Guilty, upon my Honour.  
*Charles Scharw Lord Calhcart.* Guilty, upon my Honour.  
*William Lord Craven.* Guilty, upon my Honour.  
*John Lord Clifton.* Guilty, upon my Honour.  
*Henry Lord Paget.* Guilty, upon my Honour.  
*George Lord Willoughby of Parham.* Guilty, upon my Honour.  
*John Peyto Lord Willoughby de Broke.* Guilty, upon my Honour.  
*George Lord de Ferrers of Cartley.* Guilty, upon my Honour.  
*George Lord Abergarvenny.* Guilty, upon my Honour.  
*Francis Lord Le Despencer.* Guilty, upon my Honour.  
*Charles Viscount Maynard.* Guilty, upon my Honour.  
*Thomas Viscount Wentworth.* Guilty, upon my Honour.  
*George Viscount Torrington.* Guilty, upon my Honour.  
*Frederick Viscount Bolingbroke and St. John.* Guilty, upon my Honour.  
*David Viscount Stormont.* Guilty, upon my Honour.  
*Thomas Viscount Weymouth.* Guilty, upon my Honour.  
*George Viscount Townshend.* Guilty, upon my Honour.  
*Richard Viscount Say and Sele.* Guilty, upon my Honour.  
*Anthony Joseph Viscount Montague.* Guilty, upon my Honour.  
*Edward Viscount Hereford.* Guilty, upon my Honour.  
*Wills Earl of Hillsborough.* Guilty, upon my Honour.  
*John Earl Spencer.* Guilty, upon my Honour.  
*Jacob Earl of Radnor.* Guilty, upon my Honour.  
*Robert Earl of Northampton.* Guilty, upon my Honour.  
*Henry Earl Fauconberg.* Guilty, upon my Honour.  
*Henry Earl of Darlington.* Guilty, upon my Honour.  
*Philip Earl of Hardwicke.* Guilty, upon my Honour.

*Richard*



*Richard Grenville Earl Temple.* Guilty, upon my Honour.  
*William Earl Fitzwilliam.* Guilty, upon my Honour.  
*John Earl of Buckinghamshire.* Guilty, upon my Honour.  
*George Earl Brooke.* Guilty, upon my Honour.  
*William Earl of Harrington.* Guilty, upon my Honour.  
*Thomas Earl of Effingham.* Guilty, upon my Honour.  
*John Earl of Ashburnham.* Guilty, upon my Honour.  
*John Earl Waldegrave.* Guilty upon my Honour.  
*John Earl Ker.* Guilty, upon my Honour.  
*Thomas Earl of Macclesfield.* Guilty, upon my Honour;  
*Philip Earl Stanhope.* Guilty, upon my Honour.  
*Henry Earl of Sussex.* Guilty, upon my Honour.  
*Heneage Earl of Aylesford.* Guilty, upon my Honour.  
*Charles Earl of Tankerville.* Guilty, upon my Honour.  
*William Earl of Strafford.* Guilty, upon my Honour.  
*Edward Earl of Oxford and Earl Mortimer.* Guilty, upon my Honour.  
*Niel Earl of Rosebery.* Guilty, upon my Honour.  
*Hugh Hume Earl of Marchmont.* Guilty, upon my Honour.  
*John Earl of Breadalbane.* Guilty, upon my Honour.  
*George Earl of Dalhousie.* Guilty, upon my Honour.  
*John Earl of Loudoun.* Guilty, upon my Honour.  
*John Earl of Galloway.* Guilty, upon my Honour.  
*James Earl of Abercorn.* Guilty, upon my Honour.  
*George James Earl of Cholmondeley.* Guilty, upon my Honour.  
*George Bussy Earl of Jersey.* Guilty, upon my Honour.  
*George William Earl of Coventry.* Guilty, upon my Honour.  
*William Henry Earl of Rockford.* Guilty, upon my Honour.  
*Richard Lumley Earl of Scarborough.* Guilty, upon my Honour.  
*Other Earl of Plymouth.* Guilty, upon my Honour.  
*Henry Earl of Gainsborough.* Guilty, upon my Honour.  
*Frederick Augustus Earl of Berkeley.* Guilty, upon my Honour.  
*Henry Earl of Doncaster.* Guilty, upon my Honour.  
*Frederick Earl of Carlisle.* Guilty, upon my Honour.  
*William Anne Holles Earl of Essex.* Guilty, upon my Honour.  
*John Earl of Sandwich.* Guilty, upon my Honour.  
*Sackville Earl of Thanet.* Guilty, upon my Honour.  
*George Earl of Winchelsea and Nottingham.* Guilty, upon my Honour.  
*George Harry Earl of Stamford.* Guilty, upon my Honour.  
*Basil Earl of Denbigh.* Guilty, upon my Honour.  
*Henry Earl of Suffolk and Berkshire.* Guilty, upon my Honour.  
*Francis Earl of Huntingdon.* Guilty, upon my Honour.  
*Edward Earl of Derby.* Guilty, upon my Honour.  
*Francis Seymour Earl of Hertford, Lord Chamberlain of the Household.* Guilty, upon my Honour.  
*William Earl Talbot, Lord Steward of the Household.* Guilty, upon my Honour.  
*Charles Watson Marquis of Rockingham.* Guilty, upon my Honour.  
*Hugh Duke of Northumberland.* Guilty, upon my Honour.  
*Henry Fienes Pelham Duke of Newcastle.* Guilty Erroneously, but not Intentionally, upon my Honour.  
*Francis Duke of Bridgewater.* Guilty, upon my Honour.  
*John Frederick Duke of Dorset.* Guilty, upon my Honour.  
*James Duke of Chandos.* Guilty, upon my Honour.  
*George Duke of Manchester.* Guilty, upon my Honour.  
*William Henry Cavendish Duke of Portland.* Guilty, upon my Honour.  
*Alexander Duke of Gordon.* Guilty, upon my Honour.  
*George Duke of Marlborough.* Guilty, upon my Honour.  
*William Duke of Devonshire.* Guilty, upon my Honour.  
*Harry Duke of Bolton.* Guilty, upon my Honour.  
*George Duke of St. Albans.* Guilty, upon my Honour.  
*Henry Duke of Beaufort.* Guilty, upon my Honour.  
*Augustus Henry Duke of Grafton.* Guilty, upon my Honour.



*Charles Duke of Richmond.* Guilty, upon my Honour.  
*William Earl of Dartmouth, Lord Privy Seal.* Guilty, upon my Honour.  
*Granville Leveson Earl Gower, Lord President of the Council.* Guilty, upon my Honour.  
*His Royal Highness Henry Frederick Duke of Cumberland and Stratbarn.* Guilty, upon my Honour.

Then the Lord High Steward, standing uncovered at the Chair, laying his Hand upon his Breast, said,

*Lord High Steward.* My Lords, I am of Opinion that the Prisoner is GUILTY, upon my Honour.

*Lord High Steward.* My Lords, All your Lordships have found the Prisoner Guilty of the Felony whereof she stands indicted, One Lord only excepted; who said, that she was Guilty—"erroneously, but not intentionally:" Is it your Lordships Pleasure that she should be called in and acquainted therewith?

*Lords.* Ay, ay.

Proclamation was then made for the Deputy Usher of the Black Rod to bring her Grace the Duchess of Kingston to the Bar; which was done. Afterwards Proclamation was made for Silence, as usual.

*Lord High Steward.* Madam, The Lords have considered the Charge and Evidence brought against you, and have likewise considered of every Thing which you have alledged in your Defence; and, upon the whole Matter, their Lordships have found you Guilty of the Felony whereof you stand indicted. What have you to alledge against Judgment being pronounced upon you?

*The Duchess of Kingston delivered a Paper, wherein her Grace prayed the Benefit of the Peerage according to the Statutes.*

Then his Grace the Lord High Steward asked the Counsel for the Prosecution, whether they had any Objection to the Duchess's Claim of the Benefit of the Peerage?

*Mr. Attorney General.* My Lords, Not expecting to be called upon, I did not attend to the Form of Words used by the Prisoner—However I understand, that she claims the Benefit of the *Statutes*; not confining herself, I suppose, in the Form of her Claim, to *one* Statute; but, alledging herself to be a Peerefs, claims the Benefit of *both*; meaning to insist, that the Act, which exempts Women from Judgment of Death, is to be construed with Reference to that, which allows Clergy to Lords of Parliament.

My Lords, Upon this Claim I suppose Two Questions will naturally arise; One, whether it be competent in her Situation to claim *that* Judgment, or an analogous Judgment to *that*, which would have been pronounced upon a Lord in Parliament convicted of the like Offence; the other, what would be the Extent, or possible Extent of *that* Judgment upon a Lord of Parliament, so convicted.

My Lords, I speak to both these Questions; because I conceive, that, without aggravating the Offence, I may fairly assume, that all the Qualifications, which were put upon it, have been fully and effectually proved; the Marriage; the Issue of that Marriage; the Fraud upon publick Justice; the additional Aggravation, that it was no less a Surprize upon the Duke of Kingston, than a Scandal to the Rest of the World.

This being the true State of the Case, it must occur to every noble Lord's Mind, that the Laws of this Country would be considerably disgraced, if it were possible to state to such a Court such a Crime, attended with all its Circumstances and Qualifications, as an Object of perfect Impunity.

In this Point of View, I shall take it for certain, that, if I can establish in the Judgment of your Lordships my own firm Persuasion, that this Claim to avoid Judgment of Death cannot be made under the Statute of *Edward VI.* or with any Reference to it, but must resort to the Act of *William and Mary*, I shall then have laid before your Lordships that Opportunity, which Justice, undoubtedly, will be desirous to lay hold on, of pronouncing a Judgment somewhat more adequate to the Offence; though perhaps, in the Opinion of many, far enough from adequate. Or, if, contrary to my present Thoughts, she may claim any Benefit from the First Statute, yet the Act of *Elizabeth* will enable your Lordships to make some slight Satisfaction to the Law for so enormous a Violation of it.



My Lords, This I take to be a clear Proposition, that, from the Beginning of Time to this Hour, *Clergy* was never demandable by *Women*. By the ancient Law of the Land this Privilege was so favourably used, that, Reading was sufficient Proof of Clergy; and all were taken to be Clerks, who lay under no *indispensable Impediment* to receive Orders. This Rule is laid down in all the Books. Several Statutes, nay the provincial Constitution of 1531, adopt the Distinction thus made between Persons in Holy Orders, and *other Clerks*, or *Lay Clerks*. But Women were under this *indispensable Impediment*. They might be professed, and become religious; but even a Nun could not claim this Privilege. This is proved by the same Books: And Lord *Hale* puts the Case of Manlaughter; where the Husband shall have his Clergy, and the Wife no Privilege. The Statutes, which exempt Women from Judgment of Death, expressly recite, that they were not intitled to Clergy; and distinctly provide a new and different Species of Exemption.

Having reminded your Lordships of this clear Rule in the Law, I shall take up the Statutes, which are material to this Argument, in their Order of Time. This will lead me to consider; First, what is the true Nature and Extent of that Exemption from capital Punishment, which his Clergy gives to a Lord of Parliament, by the First of *Edward* the Sixth, and the Eighteenth of *Elizabeth*; Secondly, whether the Twenty-first of *James*, or the Third and Fourth of *William* and *Mary* contain any Reference to those other Laws.

In order to explain the true Effect of the Statute of *Edward* the Sixth, I shall consider the Situation, in which the Peerage stood with respect to Clergy, at the Time of making it. I say the Situation of the Peerage as to Clergy; because it will not be doubted, I suppose, that they were intitled to this valuable Privilege in common with others. So peculiar and cruel a Distinction could not have remained in perfect Silence for such a Number of Years. Nor, if they had been intitled to claim it upon peculiar Terms, would those have been unnoticed. Besides, if there be no Evidence of such a Privilege at *any Time*, how can it be claimed *now*?

Although the Allowance of Clergy was setting aside the Conviction as to the Person of the Offender, his Goods remained forfeit, and the King seized his Lands under the Record: By the 4th of *H. VII.* c. 13, it was to be allowed but once; and the Convict was to be branded in open Court, before the Judge. And in the very Year of the Statute now under Consideration a long List of Offences was deprived of it; and, even where it remained, Slavery, with an Iron Yoke, was inflicted on the Convict, as a Vagabond.

It was thought too much to leave the Lords of Parliament exposed to those cruel and shameful Stigmata; especially in Cases, where they might make Purgation, and so be restored to the Exercise of their high Functions: Nay in such Instances even Forfeiture was thought too much. It was also conceived by their Lordships, that, in their Case, capital Punishment had extended too far. It was also thought proper to deliver a Lord of Parliament from the Necessity of proving his Title to Clergy in the ordinary Way. Therefore, by the 1 *E. VI.* c. 12, f. 14, it was enacted, "That in all and every Case and  
" Cases, where any of the King's Majesty's Subjects shall and may, upon his Prayer,  
" have the Privilege of Clergy, as a Clerk Convict, that may make Purgation; in all  
" those Cases and every of them, and also in all and every Case and Cases of Felony,  
" wherein the Privilege and Benefit of Clergy is restrained, excepted, or taken away by  
" this Statute or Act (wilful Murder and poisoning of Malice prepened only excepted)  
" the Lord and Lords of the Parliament, and Peer and Peers of the Realm, having  
" Place and Voice in Parliament, shall, by virtue of this present Act, of common Grace,  
" upon his or their Request or Prayer, alledging that he is a Lord or Peer of this Realm,  
" and claiming the Benefit of this Act, though he cannot read, without any Burning in the  
" Hand, Loss of Inheritance, or Corruption of his Blood, be adjudged, deemed, taken,  
" and used, for the First Time only, to all Intents, Constructions, and Purposes, as a Clerk  
" Convict, and shall be in Case of a Clerk Convict, which may make Purgation, without  
" any further or other Benefit or Privilege of Clergy to any such Lord or Peer from thence-  
" forth at any Time after for any Cause to be allowed, adjudged, or admitted; any Law,  
" Statute, Usage, Custom, or any other Thing to the contrary in any-wise notwithstanding."  
More shortly thus—At present, Men prove their Clergy by Reading; and must forfeit, and be branded, before it may be obtained. For the future, in all Cases, where any of the King's Subjects may now obtain Privilege, as a Clerk Convict, who may make Purgation, a Lord of Parliament, without Reading, Burning, or Forfeiture, shall be adjudged, and used as, a Clerk Convict, who may make Purgation. All, that was harsh in the Law, was taken off the Peerage: All, that was left, was Privilege. The Trial by the Bishop and his Clerks (which differed from Trial by Peers, no more in the Case of a Lord, than of a Com-  
moner)



moner) was not substituted in the Place of legal Trial, but superadded to it, for his Advantage. This was the only Way, which had then been thought of, in any Case, to avoid Judgment of Death. The Reason of the Thing, and the express Letter of the Statute unite to prove, that, till the Eighteenth of *Elizabeth*, a Lord of Parliament, convicted of a Clergyable Crime, and being capable of Purgation, must have been deemed and treated as a Clerk Convict, who might make Purgation, and delivered over to the Ordinary for that Purpose.

The learned and laborious *Staunford*, our ablest Writer, at least on this Branch of the Law, treats it as a Thing without Question, Fol. 130, *A Lord shall have Privilege of Clergy, where a common Person shall not have it. He ought to make Purgation; and, if so, he must be delivered to the Ordinary, to be kept, till he has made his Purgation. If he confesses, abjures, or is outlawed, he cannot have the Benefit of this Statute; because he cannot make Purgation.* *Staunford* flourished when this Statute was made; wrote a few Years after; and died before the Eighteenth of *Elizabeth*. His therefore is a contemporary Exposition of it, unentangled with the casual Phrase of any subsequent Act.

*Hale*, in his Second Volume, Fol. 376, where he seems to differ from *Staunford*, as to the Extent of the Statute, agrees with him as to the Nature of the Privilege; which he calls *The Clergy of Noblemen*. At one Time, Judges would not deliver Clerks to the Ordinary, who had become incapable of Purgation, by Confession, or otherwise. The Church alleged, that nothing done before an unlawful Judge was sufficient to sustain their Process, or Sentence. Whereupon the *Articuli Cleri* provided, that all Clerks shall be delivered to their Ordinaries. But they were delivered, in the Instances mentioned by *Staunford*, *absque Purgatione faciendâ*. Now the Case put in the Statute is, where *any Man* may have the Privilege of Clergy, as a Clerk Convict, *that may make Purgation*. And a Lord of Parliament, being in the same Predicament, was put in the Case of a *Clerk Convict that may make Purgation*, without Reading or undergoing the Pains, which attended a Commoner under those Circumstances. *Staunford* therefore thought, that these Exemptions did not reach to the Case, where, before the Statute, there could be *no Purgation for any Man*. And the Opinion was so probable, at least, that a very eminent Lawyer, of unexceptionable Character, in the Time of the great Rebellion, actually burnt a Peer, who confessed. *Hale* doubts; especially at this Day, when Delivery to the Ordinary and Purgation are both taken away by the Eighteenth of *Elizabeth*. It is not obvious what Difference that makes. *I think*, says he, *it was never meant, that a Peer of the Realm should be put to read, or be burnt; where a common Person should be put to his Clergy*. Both agree, that the Peer should have had his Clergy, and have been delivered to the Ordinary, and have made Purgation, — exempt from the concomitant Penalties; *in some Cases*, says *Staunford*; *in all*, says *Hale*. But even *Hale* makes no Doubt of Peers being liable to Imprisonment.

In the Trial of Lord *Warwick*, the Chief Justice lays it down, *That the Statute of Edward VI. exempted Peers from the Penalty of Burning, and repealed the Statute of Henry VII. as to so much*. Then a Peer was liable to Burning before; and by the Act of *Henry VII.* which, in Terms, puts it upon *Persons admitted to their Clergy*. But how could it be seriously agued, that a Thing so anxiously repealed never existed?—I have consulted on this Occasion as many Books, as I could think of referring to; and I don't recollect One, which supposes a Time, when a Peer had not the Benefit of his Clergy.

Nothing, it must be confessed, could be more unprincipled, and incongruous, than to suffer the Truth or Justice of a Conviction at Common Law to be questioned in the Ecclesiastical Court. But the Church had not then lost its Hold upon Mens Minds; nor would, probably, for some Ages, but for its own glaring Misconduct.

The Trial, called Purgation, as it was had in the Bishops Court, was a ridiculous Mockery of Justice; or became serious, only by the Perjury, which it produced. It was therefore abolished. But simply to abolish it would also have cut off that Imprisonment, which followed a Conviction in the Bishops Court, and which (it should have been presumed) would always follow actual Guilt. To remedy which, it was thought fit to give the Court Authority to punish by Imprisonment for any Time less than a Year. This was proper in all Cases; but particularly so in the Cases of Peers, and Persons in holy Orders, who were not liable to Burning in the Hand. It was therefore enacted by the Eighteenth of *Eliz.* c. 7, s. 2, and 3, “That every Person and Persons, which at any Time, after this present Session of Parliament, shall be admitted and allowed to have the Benefit or Privilege of his or their Clergy, shall not thereupon be delivered to the Ordinary, as hath been accustomed; but, after such Clergy allowed, and Burning in the Hand according to the Statute in that Behalf provided, shall forthwith be enlarged, and delivered out

“ of



“ of Prison, by the Justices, before whom such Clergy shall be granted, that Cause notwithstanding.”

“ Provided, nevertheless, and be it also enacted, That the Justices, before whom such Allowance of Clergy shall be had; shall and may, for the further Correction of such Persons, to whom such Clergy shall be allowed, detain and keep them in Prison, for such convenient Time, as the same Justices in their Discretion shall think convenient; so as the same do not exceed one Year's Imprisonment; any Law or Usage, heretofore had or used, to the contrary notwithstanding.”

The Effect of these Words, *shall forthwith be enlarged and delivered out of Prison, that Cause notwithstanding*, is to give the Person so enlarged exactly the same State and Condition, which he would have obtained, under the former Dispensation of Law, by going through the Process of Purgation, and so being delivered from the Offence. This Part of the Act carries a great Effect upon the Construction of the Whole. In Conversation, I have heard the Words, *after Burning in the Hand*, supposed to be the Phrase, upon which some Doubt might turn, whether Peers are included in the Act. But, in the Construction of such a Statute, it is not enough to find a Phrase, upon which some Doubt might turn. It would be fitter for those, who conceive the Doubt, to proceed at least One Step further; and state, to what Extent their Doubt goes. Is it doubted, whether Purgation be taken away in the Case of a Peer, and the Peer be restored to his Law without it? Will any Gentleman argue, that, at this Day, a Peer convicted of a Clergyable Crime, shall not be forthwith enlarged; but must be delivered to the Ordinary to make his Purgation? This Point, I believe, never has, nor ever will be argued. If he is not to undergo Purgation, *quo Jure* is he exempt? Does any other Statute exempt a Peer from his Purgation, or discharge him from his Attainder, but this general Statute of the Eighteenth of *Elizabeth*; which, in its large Phrase, comprehends every Body? I protest I know of none. Or, does this Statute exempt any, but those, who shall be thereafter *admitted to Clergy*? The Words, *after Burning in the Hand*, do not make an essential or necessary Article in the Description of the Persons to be discharged; nor create any Term, or Condition, upon which the Discharge is to obtain. The Description of the Persons to be discharged is absolved in these Words, *all Persons who shall be allowed the Benefit of their Clergy*. They are to be discharged absolutely. But when? and in what Manner? why, after the Allowance of Clergy, and Burning in the Hand *according to the Statute*; which is to say, in the Cases provided by the Statute; of which the Case of a Peer is not one.

The whole Consequence is no more than this, that, in a Case circumstanced like the present, where the Honour of the Law, and the Purity of Manners require some Example to be made, your Lordships may follow the Bent of your Discretion, by resorting to the last Clause in the Eighteenth of *Elizabeth*. This I say, upon a Supposition, that some Peer stood convicted of the like Offence, with similar Aggravation; or that, upon the Rest of the Argument, it will be possible to give any Woman the Benefit of any Statute, *pari ratione*, as Peers have the Benefit of Clergy, under the First of *Edward VI*. But I hope to prove soon, that it is impossible to construe the subsequent Statute in that Manner. Consequently there will be due to this Crime a very different Sort of Punishment, than that, which I have alluded to:

It will hardly be said, that these Statutes relate to Women of any Condition. The Expression excludes them distinctly enough. If that had been more general, the Subject Matter excludes them absolutely. They are no more Clerks, than Lords of Parliament. They never underwent Purgation; nor were delivered to the Ordinary; they were therefore incapable of receiving these Privileges: For these Acts were merely to regulate an old Right, not to give a new one. Both the Statutes, which give them their Exemption, recite it as a general Proposition, that Women were not intitled to Clergy. Nor have I even seen any Statute, Case, or Book, wherein any Condition of Women is supposed exempt, but by virtue of the Laws, I shall state presently. It remains then to be considered, whether the Exemption, provided by those Laws, has any Reference to the Statute of *Edward VI*.

The First Statute, which exempts Women from capital Punishment in any Case of Felony, is the Twenty-first of *James I*. c. 6, which runs thus; “ Whereas, by the Laws of this Realm, the Benefit of Clergy is not allowed to Women convicted of Felony; by reason whereof many Women do suffer Death for small Causes; be it enacted by the Authority of this present Parliament, that any Woman, being lawfully convicted by her Confession, or by the Verdict of Twelve Men, of, or for the felonious Taking of any Money, Goods, or Chattels above the Value of Twelve Pence, and under  
“ the



“ the Value of Ten Shillings; or as Accessary to any such Offence; the said Offence  
 “ being no Burglary, nor Robbery in or near the Highway, nor the felonious  
 “ taking of any Money, Goods, or Chattels, from the Person of any Man or Wo-  
 “ man privily, without his or their Knowledge, but only such an Offence, as in the  
 “ like Case a Man might have his Clergy, shall, for the First Offence, be branded,  
 “ and marked in the Hand, upon the Brawn of the Left Thumb with a hot burning Iron,  
 “ having a Roman T upon the said Iron; the said Mark to be made by the Gaoler,  
 “ openly, in the Court, before the Judge; and also to be further punished by Imprison-  
 “ ment, Whipping, Stocking, or sending to the House of Correction, in such Sort, Man-  
 “ ner, and Form, and for so long Time (not exceeding the Space of One whole Year) as  
 “ the Judge, Judges, or other Justices, before whom she shall be so convicted, or which  
 “ shall have Authority in the Cause, shall, in their Discretion, think meet, according to the  
 “ Quality of the Offence, and then to be delivered out of Prison for that Offence; any  
 “ Law, Custom, or Usage to the contrary notwithstanding.”

This Statute, at least, excludes all Colour of Reference to the First of *Edward VI.* Any Woman convicted of Grand Larceny (if it be but a simple Felony, Clergyable in a Man) shall be burnt. She was not put to demand Benefit of the Statute; to pray her Clergy would have been too absurd; but, the Larceny being stated in the Record to be committed by a Woman, Judgment was forthwith entered of Burning, and so forth. The Statute is, moreover, confined to such Larcenies, where, *in the like Case*, a Man might have his Clergy. I take Notice of these Words at present, only for the Sake of remarking that, in this Statute, at least, they must relate to the Quality of the Offence, not to the Condition of the Offender.

My Lords, The only Statute, of which the Prisoner can claim the Benefits against Judgment of Death, is the Third and Fourth of *William and Mary*, c. 9, s. 6, which runs in these Words; “ And whereas, by the Laws of this Realm Women convicted of Felony, for stealing of Goods, and Chattel of the Value of Ten Shillings, and upwards, and for other Felonies, where a Man is to have the Benefit of his Clergy, are to suffer Death; be it therefore enacted and declared by the Authority aforesaid, That, where a Man, being convicted of any Felony, for which he may demand the Benefit of his Clergy, if a Woman be convicted for the same or like Offence, upon her Prayer to have the Benefit of *this Statute*, Judgment of Death shall not be given against her upon such Conviction; or Execution awarded upon any Outlawry for such Offence; but shall suffer the same Punishment, as a Man should suffer, that has the Benefit of his Clergy allowed him, in the like Case; that is to say, shall be burnt in the Hand by the Gaoler, in open Court, and be further kept in Prison for such Time as the Justices in their Discretion shall think fit, so as the same do not exceed one Year’s Imprisonment.” Under this Act, to avoid Judgment of Death, the Prisoner must pray the Benefit of this Statute.

I collect from Conversation, perhaps too idle to be referred to, that the Argument will be laid thus. A Woman Convict of a Felony, which would be Clergyable in a Man, shall suffer the same Punishment, as a Man would do *in the like Case*, that is, as a Man of *the same Condition* with herself: But a Peer would suffer no Punishment: Therefore a Woman of *that Condition* shall suffer none.

The Words, *in the like Case*, must mean the same here, as in the Twenty-first of *James*, convicted of *the like Offence*. And the Words, *of the same Condition* must be wholly super-added, if they are admitted at all. But it is impossible to conceive, that, if the Legislature had meant to create so important a Distinction between different Orders of Women, it would have used no Words for that Purpose. Nor, indeed, can such a Distinction be so created by any Operation of Law.

If, in Favour of the Prisoner, the slightest Degree of Punishment, which *any Man* can suffer *in the like Case*, is to be intended, *every* Woman would claim Exemption from Burning, because inferior Ecclesiasticks are not burnt; and from Forfeiture, because Lords of Parliament are neither burnt nor forfeit. But this absurd Construction happens to be thrown out by the Act itself, which appoints the Punishment, it means, to be Burning and Imprisonment. The Statute therefore will not suffer it to be understood, that any Woman, convicted of any Felony, shall suffer no other Punishment, than those who, it is now contended, are to suffer no Punishment at all.

Upon these Grounds I submit to your Lordships, that the Judgment, to be pronounced upon every Woman, of whatever Quality or Denomination, is that, which is prescribed by



the Third and Fourth of *William and Mary*; and that there is no Ground or Warrant of Law to insist, that a Peereſs can avoid Judgment of Death upon any other Terms.

My Lords, The whole Queſtion is upon *Burning*. The *Imprisonment* is the ſame either Way. Now, if there be Prudence or Propriety of any Sort in eſta bliſhing ſuch an Exemption for Peereſſes, let that Prudence or Propriety be ſtated, where by the Conſtitution of this Country ſuch an Application ought to be made to Parliament. If the Parliament ſhould think fit to create new Privileges, or add new Diſtinctions to any Order of Men, or Women, they are competent to do it. But it would be aſſuming too much for any Court of Juſtice. Your Lordſhips ſit here merely as a Court of Juſtice, not as a Houſe of Legiſlature. To do that by forced and arbitrary Interpretation of Law, which ought only to be done by Act of Legiſlature, is too much enhancing the Prerogative of the Judge; and too much confounding thoſe Authorities, which ought to have plainer Marks and broader Limits ſet between them.

*Mr. Wallace.*

My Lords, I did not ſuppoſe it would have fallen to my Share to give your Lordſhips any Trouble upon this Subject; and therefore I have not very lately looked into the Statutes which have been mentioned; but I will ſtate to your Lordſhips in general, what I underſtand to be the Privilege of Peereſſes at this Day.

By the 20th *Hen. VIth.* Chap. 9. to obviate Doubts which had ariſen upon *Magna Charta*, Peereſſes are put upon a Footing with Peers with reſpect to Trial and Punishment; and by an equitable Conſtruction, Peereſſes by Titles ſince created, as Marchioneſſes and Viſcounteſſes, are within the Act.

At the Time of paſſing the Act of *Edward* the VIth the Lords of Parliament are mentioned, which at that Time of Day comprehended the whole Peerage. In this Situation were Peers at the Time of paſſing the Statute of the 18th of *Elizabeth*, which Statute cannot relate to them. Every Perſon, who is to be admitted or allowed to have the Benefit or Privilege of Clergy, ſhould not after burning in the Hand be delivered to the Ordinary, as has been cuſtomary, but may be detained in Priſon. This Proviſion clearly refers to the Situation of Commoners, and not of Peers: It refers to thoſe who were at the Time of making the Act liable; whereas Peers were not in that Condition; they were not to pray their Clergy, but the Benefit of that Act, and to be delivered out without burning in the Hand. The Direction given by the Act is to Juſtices; an Expreſſion never applied, I believe, in any Act to the Lords in Parliament ſitting in their Judicial Capacity as a Criminal Court: The Juſtices are to keep ſuch Perſons in Priſon after they are burnt in the Hand; which is a Demonſtration that inferior Courts are alluded to; and it is under this Statute Imprisonment is inflicted upon Perſons intitled to their Clergy.

At the Time of paſſing the Statute of the 3d and 4th of *William and Mary* Peers were exempt from burning in the Hand and Imprisonment in Clergyable Cafes, which Commoners were ſubject to. By this Law Women are put on the ſame Footing with Men, and the Courts before whom they are tried are to inflict the ſame Punishment as they are authorized to do upon Men. Theſe Proviſions make it, in my Apprehenſion, extremely clear, that the Peereſſes were intended to be placed in the ſame Condition with Peers, as they were by *Magna Charta*, explained by the Statute of *Edward* the VIth. Would it not be the moſt harſh and cruel Interpretation, if the Act was even doubtful, to ſubject a Peereſs to a Punishment for the ſame Crime which her Huſband is exempt from? The Conditions of Perſons create Diſtinctions in the Conſtruction of Laws; but the Attempt now made is to confound all Ranks, and by ſuppoſed literal Interpretation to involve one of your Lordſhips own Situation in the Punishment, which the Legiſlature has been ſo anxious to extricate you from.

*Mr. Mansfield.*

It is not till this Moment, that I had any Apprehenſion myſelf, that any Queſtion of this Sort would be agitated before your Lordſhips, and therefore I can only ſpeak of the ſeveral Statutes referred to from my general Memory of them; but I apprehend that the Conſtruction of theſe Statutes will not, cannot be ſuch as is now contended for on the Part of the Proſecutor. The Object of the Conſtruction wiſhed by the Proſecutor is this, that the Laws of this Country are to make a Difference between one Sex and the other; that they are now at this Time of Day to be ſo determined as to inflict a more ſevere, a more cruel Punishment upon a Woman than on a Man, though the Offence committed be the ſame.

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Now,



Now, such a Construction your Lordships would never suffer, nor any Court of Justice in this Country would suffer to take Place, unless there should something be found in the Law which necessarily requires it: And taking the several Statutes together relating to this Subject, I apprehend your Lordships will be of Opinion, that these Statutes do not only not require, but that they exclude, such Absurdity, such Inhumanity.

My Lords, The Statute upon which the Whole must be founded, as I conceive, is that of the 20th of King *Henry* the VIth which, as well as I recollect from my Memory, is Chap. 11, which first provides expressly, though I believe it is considered only as a Declaration of the Common Law, but provides, that Peereffes, should be tried, and, if I recollect the Words rightly, should not only be tried, but should be judged in the same Manner as Peers; and remembering what has happened upon that Statute, I must put your Lordships in Mind, that such has been the Benignity of the Construction upon it, that though only Three Ranks of Peereffes are named, it has been clearly held in Construction to extend to all. The Three that are mentioned, I think, are Duchesses, Countesses, and Baronesses; the Construction is, that it extends to Marchionesses and Vicountesses, because they are intitled in the Spirit and Meaning of the Law to the same Privilege, which is given to the other Ladies by Name. The clear Result and Effect of this Statute is, to say in general Terms, that Women of that high Rank should be tried and should be judged in the same Manner as Men. The Terms used in the Act are general. Whoever reads that Law, will be astonished to hear any Man contending, that in imposing Judgment upon a Peereffs your Lordships are to be guided by a different Rule from that, which you would follow if you were passing Judgment upon a Peer. The next Statute to be considered after this, as a general Statute upon the Subject, is that of the 3d and 4th of King *William* the Third. Did that Statute mean; were the Legislators that made it so forgetful of what was due to Humanity, and to themselves and their own Characters, as to mean, that a Distinction in Punishment should prevail between one Sex and the other to the Prejudice of that, which is intitled to the greater Indulgence and Compassion? Most certainly not; because the express Provision of that Statute is, that Women convicted of Offences intitled to the Benefit of Clergy should suffer in the same Manner as Men would suffer convicted of the same Offences.

My Lords, No Man, who can read that Statute, and reason upon it, can help concluding that it was the Object of that Law to say, that where Women were convicted of Clergyable Offences, they should be in as good a Situation as Men, who were convicted of the like.

My Lords, Taking these Two Statutes of the 20th of *Henry* the Sixth providing for the Trial and Judgment of Peereffes, and the general Statute of the 3d and 4th of *William* the Third giving the Benefit of Clergy to Women, I should think it impossible to say, that Peereffes convicted of a Clergyable Offence were not to have precisely the same Privileges as Peers convicted of such Offences.

My Lords, If there be any Rule of Construction in the Law, which is indisputable, for expounding Statutes, it is this, that Statutes, as we say, *in pari materia*, relating to one Subject, are to be considered as one Law, taken and interpreted together as throwing Light one upon the other: No Rule of Construction is better established. Follow that Rule of Construction here: Take First the general Law for the Trial of Peereffes and the Judgment of Peereffes in the same Manner as of Peers; then take the general Law, giving the Benefit of Clergy to Women in the same Manner as to Men; and who will not say, that that Rule of Construction does not necessarily tend to put both, upon the Rank of Men and Women, in the same Condition, when convicted of the same Species of Offence? But what are the particular Acts of Parliament, which have been referred to as requiring a different Construction? By the First of *Edward* the Sixth, it is extremely clear, that Peers are not to undergo the ignominious Punishment of Burning. The Statute, that follows that of *Edward* the Sixth, is the 18th of *Elizabeth*, which takes away the Delivery to the Ordinary, substitutes Burning in its Place, and then gives a Power to imprison. Whoever reads that Act, will see that it certainly was confined to Cases, where Punishment was to be inflicted by Justices upon Persons of an ordinary Description, not Persons of the Rank of Peers; and the Statute strictly and clearly relates only to Persons so having Clergy allowed, as is prescribed by that Statute: And if the 18th of *Elizabeth* is to have the Construction which is contended for, I understand it must have Effect also to inflict the Punishment of Burning upon Peers. So much, my Lords, for the Statute of the 18th of *Elizabeth*. The 21st of King *James* was mentioned as first in Part giving Clergy to Women: The 3d and 4th of King *William* the Third, is mentioned as alluding to it; it does so, but the Provisions of the 3d and 4th of King *William* the Third are general, that is, a general Law extending the Benefit of Clergy to Women in all Cases:



Now it is said there, that they shall have the same Punishment as Men; they are to be in the like Situation as Men. Then the Act goes on to say, that is to say, Burning and Imprisoning.

My Lords, What is the fair Construction of this Law? Why, that Women shall be in the same Situation as Men; and where Men are of such Condition, that they would be burnt in the Hand, that they would be liable to be imprisoned, Women in like Manner should be subject to Burning in the Hand, and should be subject to Imprisonment: But no one ever heard, that the severe Part of a Law inflicting a Punishment should be extended so by Construction, where it was not so express. Now you must act against the clear Provision of that Law, that Women should be in the same Situation as Men, if you were to say, that a Peere convicted of a Clergyable Offence should either undergo the Punishment of Burning, or the Punishment of Imprisonment. No one can say upon the Statute of *Edward* the Sixth, that they are subject to either. The Object of the Statute of *William* the Third was to make the Punishment of such Offenders precisely the same with regard to one Sex as the other; and the true Spirit and great Object of that Law must be directly acted against, if a Peere was to be put in a different Situation than a Peer, and to have a more severe and cruel Punishment inflicted upon her, than would be upon him. These are the only general Observations, that occur to me now in taking the whole Scope of the Law: I therefore submit to your Lordships, that the noble Lady at the Bar is intitled to the Benefit of these Statutes.

*Mr. Attorney General.*

My Lords, Concerning the Point which is now depending before the House, I fairly confess, that, when your Lordships first called upon me to give my Reasons why Judgment of Death should not be suspended upon the Prayer of the Prisoner, made in the Manner in which that Prayer was conceived; and upon the Effects and Consequences of allowing her the Benefit of the Statute in a more regular Course; I would rather, if I might, have been excused from laying my Thoughts before your Lordships. I had heard a Rumour, that Men, whose Learning and Authority I greatly reverence, held a different Opinion. This would not fail to raise much Distrust of my own Conclusions; although I had thoroughly considered the Subject; and although I never read any Proposition, with more perfect Conviction of the Truth of it, since I learnt to read.

My Lords, That Idea, the only one I have been able to form, or adopt, is now very much strengthened. That Cloud, which came over it from the rumoured Prevalence of contrary Notion, is very much removed. Because, if there be no Opinion to the contrary, but what is to be founded on the Argument, I have heard to Day from those who are best able to sustain the contrary Opinion, I am perfectly satisfied, it is impossible this should pass as a Point of Law, or receive the Sanction of your Lordships Concurrence.

My Lords, What are the Arguments? First, It is utterly inconceivable, that the Law should put such Difference between the Two Sexes. My Lords, if the Subject was laid by for a Moment, only to make a handsome Compliment to a very respectable Part of this Assembly, which well deserves all the Attention it commands, it is impossible to quarrel with a Turn of Gallantry. But, resuming the Subject, we are all agreed, that the Law did actually put that very Difference between the Sexes for many Centuries. And this uncourtly Statute of *Edward* the Sixth, proceeding upon the Law as it found it, did not think of abolishing the Distinction. It was quite beside the Purpose of that Act, which did not mean to qualify the Severity of the Criminal Law in general, much less to make an equal Distribution of it among the Subjects at large. But, taking the Law as it stood, it was found inconvenient, incompatible, and shocking to Reason, that Lords of Parliament, who were to give their Voices upon the most arduous Affairs of a great Empire, should do so under apparent Stigmata and Circumstances of open Infamy. I don't rely on the Gender of the Words, but on the Purpose of the Act. Women are excluded by both. They were neither liable to the Stigmata, nor held the high Office which made them intolerable. Therefore Bishops, whom the Twenty-eighth and Thirty-second of *Henry* the Eighth had, at that Time, made liable to the whole Case of other Clerks convicted, were included: Women certainly not. The Privilege was given, not to the Peerage, but to the House of Parliament, to be claimed by the Members as such. It was not substantive; but an Ingraftment on the Right to Clergy, which Women never had. In Truth, I have not heard a Hint from the Counsel on the other Side to question the Existence of this Difference down to the Third and Fourth of *William* and *Mary*; upon which Act they have chiefly relied



relied in Argument. They lay it down, that Peers convict of Clergyable Crimes are exempt from all Punishment, not being within the Eighteenth of *Elizabeth*; that Peereffes are to be tried and judged like Peers; that the Third and Fourth of *William* and *Mary* puts Women convict in the same Condition as Men; and that by some tacit Reference to the former Statutes, Peereffes convict are not to be punished at all.

I have troubled your Lordships already with my Reasons for thinking, that, in old Time, Peers enjoyed the Benefit of Clergy in common with other Men, and upon the same Terms; that in the Fourth of *Henry* the Seventh, Burning was inflicted upon them as Lay Clerks; that the Statute of *Edward* the Sixth, in the very Moment of exempting them from the Penalties incurred at Law by Conviction, adjudges them Clerks, and delivers them for Purgation in the Bishop's Court; that the Statute of *Elizabeth* delivers all, who shall thereafter be admitted to Clergy, from Purgation, and discharges them, subject to such Correction by Imprisonment for less than a Year, as the Court shall think fit.

It is not denied, that these Words, in their plain and natural Sense, embrace the Case of Peers. But, in this Context, it is supposed they do not, because the Clerks convict are to be discharged after Allowance of their Clergy, and *after burning in the Hand according to the Statute*. This last Provision, they say, cannot refer to Peers. Nay, One learned Gentleman thought, that, if it should be construed to include Peers, they must, by Force of these Words, be burnt in the Hand.

I cannot follow this Idea. I have no Way of conceiving, how an Act which inflicts, or rather reserves a Penalty, according to the Law as it then stood, can be interpreted to create a new Penalty; or, by what Chain of Reasoning it is concluded, that where all Convicts are to be discharged upon the Allowance of Clergy, and such Burning as the Law directs, those are not to be discharged at all, for whom the Law has not directed Burning. Suppose the King should pardon the Burning: It was thought, in Lord *Warwick's* Case, that would be a perfect Discharge. Burning was not substituted in the Place of Purgation: That was a meer Slip: It is contrary to the History: Burning existed before the Eighteenth of *Elizabeth*, in just the same Extent as after. Imprisonment, at the Discretion of the Temporal Judge, was the Substitute for Purgation; and is extended expressly to all, who are discharged from Purgation. But it seems too late to argue this. Was it not expressly decided in the Case of *Scarl* and *Williams*, when Prohibition went to stay the Deprivation of a Parson, who had been convicted of Manslaughter, and discharged under the Eighteenth of *Elizabeth*, although he could not be burnt? "For when the Statute says after Burning, it imports, where Burning ought to be; otherwise the Statute would do no good to Clerks, for whom it was most intended." The Case is reported in *Hobart*. The Statute speaks universally of every Body, those who were, and those who were not liable to Burning; and discharges them all, after Allowance of Clergy, and Burning according to Law, as it had stood before; that is, *reddendo singula singulis*.

The next Objection is, that the Word *Justices* will not apply to your Lordships, even while you are sitting merely in the Characters of Judges. Therefore a Statute, which is to be executed by Justices, cannot relate to a Peer, who is not triable by Justices.

Is it then seriously contended, that your Lordships, exercising your Jurisdiction in the Trial of a Peer, will not do all the same Acts of Justice, which Judges must do in the Trial of a Commoner? Upon reading many Acts of Parliament, your Lordships will find, either, that you have no Jurisdiction at all, or that you must exercise it under the Character and Denomination of Justices. The same Objection might have been made to Lord *Ferrers's* Execution; the same to the Burning a Peer under the Statute of *Henry* the Seventh. By the Word *Justices* I understand, in our Law, all Manner of Officers, who are intrusted with the Administration of Justice. So *Spelman* defines the Word. In high Antiquity, the Name went to the greatest Subject in this Country; for I take the *Justitia totius Angliæ* to have been above the *Seneschallus Regis*. Your Lordships therefore will not disdain the Name; for you sit here in no higher Character than that, which, by just and natural Construction, is attributed to the Word *Justices*. Therefore, if no better Objections can be raised than these, I apprehend the Words of the Statute sufficiently comprize the Peerage. This also was laid down in the Trial of Lord *Warwick*.

But, my Lords, if these are Objections, whither do they go? not only to subvert the Statute of *Elizabeth*, in this most reasonable Particular of giving some convenient Correction, as the Statute calls it, to a Criminal found so upon Record; but to restore a Law, which has now for many Ages been understood to be at an End; and I flatter myself, considering the Account, which the Books all give of it, that Purgation is at an End.

But I am called upon to look at the 20th of *H. VI. c. 9.* This was a meer declaratory Law; reciting the 29th Chapter of *Magna Charta*, *Nullus Liber Homo*, and so forth, and a



very absurd Doubt, whether *Homo* included both Genders; and declaring, that “Ladies shall be put to answer, and judged before such Judges and Peers” (here by the way *Judges* and *Peers* are synonymous) “as Peers should be.” But though, by *Magna Charta*, Peereffes were to be tried by their Peers, as other Women were by theirs, there the Privilege ends. All were, upon Conviction, to receive the like Judgment and Execution: And, in the Exemption from Death, the Difference was not between the Ranks, but the Sexes, of the Convicts. And so the Law undoubtedly continued, notwithstanding this Statute.

But it was said, that, by the Equity of this Statute, Marchionesses and Viscountesses were included, though not named. This was to give Countenance to the Rule, that all Statutes *in pari materia* shall be construed alike. There is great good Sense in the Rule. Marchionesses and Viscountesses were clearly within the Law declared; and consequently within the Reason of declaring it: Therefore Duchesses, Countesses, and Baroneffes were, by a Sort of Synecdoche, put for all Peereffes. So where a Privilege is saved to certain Denominations of People, all others, who were before within the same Privilege, will be within the Saving, if there be nothing in the Context to raise a Distinction against them; particularly, if the Saving be only declaratory, and not a positive Exception. Nay, in a new Law, Things, equally within the Reason of it, have been comprized in it by Construction. But this borders upon Arbitrary: Parliament seems the properest Judge of this Reason. If Peers, disqualified to vote, should claim the Benefit of the First of *Edward* the Sixth, it might be argued with some Plausibility, that they are within the Reason of the Act. They are so certainly, in every Point, except that of voting; and yet I should think it too much to overlook so material a Distinction made by the Statute itself. But if Women, who were not concerned in any Part of the Subject Matter, make the same Claim, it would be making a perfectly new Law to include them. Where then is the *paritas materiae* between the Act of *William* and *Mary*, for exempting Women from capital Punishment, and the Twentieth of *Henry* the Sixth, which had nothing to do with Punishment; or the First of *Edward* the Sixth, which had nothing to do with Women?

I did propose Two Statutes to be considered *in pari materia*, the Acts of *James* and of *William* and *Mary*; the only Two, which confer upon any Woman any Exemption from Capital Punishment. I have not heard it denied, that if a Peereff had stood convicted of the Crimes mentioned in the First Act, the Punishment there specified must have ensued. This fixes the Sense of these Words *in the like Case*. I am possessed therefore of this Ground, that the Act of *Edward* the Sixth did not touch the Difference put by the Law of Clergy between the Sexes; nor that of *James* make any Difference as to the Quality of the Offender. We go intirely upon the Act of *William* and *Mary*. It is inaccurate to say, this Act puts Women into the same Condition with Men; and still more, with Men of the same Quality respectively. There is nothing in it about the Condition of the Person. Where a Man, convict of any Felony, has Clergy, a Woman, *convict of the like Offence*, shall not have Judgment of Death, but suffer the same Punishment as a Man would suffer, with Clergy, *in the like Case*. These Words refer altogether to the Quality of the Offence; that very Crime, which in one Record, applied to a Man, infers Judgment of Death, avoidable by his Claim of Clergy, applied in another to a Woman, infers the specifick Judgment prescribed by the Act. Nor are the Two Sexes put into the same Condition, even as to Punishment. All Women avoided Judgment of Death; not so of all Men. Some were indispensably incapable of Holy Orders: Such cannot have their Clergy at this Day; nor had any other Exemption from Death before the Fifth of *Anne*. Some could not prove their Title to Clergy by Reading. Men could have their Clergy but once; Women the Benefit of this Statute *toties quoties*, till a subsequent Act altered the Law in this Respect.

Still less can the Words be twisted to create a Difference as to Rank of the Offender. It is hard, says a learned Gentleman, to put the severest Construction upon an Act of this Sort. The Act is not penal. But the shorter Answer is, there are not Two Constructions to chuse between. If the Phrase had been left general, *the same Punishment, as a Man should suffer, that had his Clergy, in the like Case*, it might have been thought uncertain what that Punishment should be; because different Orders of Men were liable to different Measure of Punishment, *in the like Case*; the Bulk of Men to Forfeiture, Burning, and discretionary Imprisonment; inferior Ecclesiasticks to Forfeiture and Imprisonment; Lords of Parliament to Imprisonment only. In such a Text there might have been Room to contend for a favourable Construction; and yet, even then, I should have thought that the Measure of Punishment allotted to the Bulk of Mankind, undistinguished by peculiar



Privileges, must have been deemed the Meaning of the Legislature. But whatever might have been the Construction of such a Text, it must have applied equally to all Women. They could not have been classed in Casts, according to the Condition of their respective Husbands; the Wife of a Lord of Parliament to be imprisoned; of an inferior Ecclesiastick to be imprisoned and to forfeit; of other Men to be imprisoned, to forfeit, and be burnt. The Statute however has put an End to all Question, by stating expressly the very Measure of Punishment allotted to all Women.

*Burnt in the Hand in open Court*, it is said, shall not apply to Peereffes, because they were never liable to be burnt at all. The Position is true, not of Peereffes alone, but of all Women. But they were liable to Judgment of Death; for which this slighter Punishment was a desirable Commutation.

My Lords, If there be any Thing in the Nature of the Punishment unreasonable, or improper to be applied to Women in general, or to Noble-women in particular, let the Matter come before Parliament. It is a legislative Consideration, and Parliament will entertain it according to the Extent of the Principle, which certainly will apply to many Noble-women of much higher Rank than some Peereffes, who, as the Law now stands, are liable to that Punishment. So, I think, they ought to remain. Guilt levels Rank. A Noble-woman, covered with the Ignominy of such a Conviction, cannot forfeit less than her Estimation.

My Lords, The only Question is this; Has any positive Law granted the Exemption now demanded, to wind up such a Record as this with perfect Impunity, a ridiculous Disgrace to publick Justice? Has this been done in exprefs Terms; or in Terms, whose necessary Construction amounts to exprefs?

My Lords, When I have qualified the Question in that Manner, I have gone to the Verge of judicial Authority. And I do desire to press this upon your Lordships as an universal Maxim; No more dangerous Idea can creep into the Mind of a Judge, than the Imagination, that he is wiser than the Law. I confine this to no Judge, whatever be his Denomination, but extend it to all. And, speaking at the Bar of an *English* Court of Justice, I make sure of your Lordships Approbation, when I comprize even your Lordships, sitting in *Westminster Hall*. It is a grievous Example to other Judges. If your Lordships assume this, sitting in Judgment, why not the King's Bench? Why not Commissioners of Oyer and Terminer? If they do so, why not the Quarter Sessions? Ingenious Men may strain the Law very far—but, to pervert it—to new-model it—the Genius of our Constitution says, Judges have no such Authority, nor shall presume to exercise it.

The Lords then adjourned to the Chamber of Parliament; and, after some Time passed there,

(See the Appendix.)

the House adjourned again into *Westminster-Hall*; when, after the usual Proclamation for Silence, his Grace the Lord High Steward, addressed the Duchets of *Kingston* to the following Effect:

*Lord High Steward.* Madam, The Lords have considered of the Prayer you have made, to have the Benefit of the Statutes, and the Lords allow it you.

But, Madam, let me add, that although very little Punishment, or none, can now be inflicted, the Feelings of your own Conscience will supply that Defect. And let me give you this Information likewise, that you can never have the like Benefit a Second Time, but another Offence of the same Kind will be Capital.

Madam, You are discharged, paying your Fees.

*Lord High Steward.* My Lords, This Trial being at an End, nothing remains to be done here, but to determine the Commission.

*Lords.* Ay, ay.

*Lord High Steward.* Let Proclamation be made for dissolving the Commission of High Steward.

*Serjeant at Arms.* Oyez! oyez! oyez! Our Sovereign Lord the King does strictly charge and command all Manner of Persons here present, and that have here attended, to depart hence in the Peace of God, and of our said Sovereign Lord the King, for his Grace my Lord High Steward of *Great Britain* intends now to dissolve his Commission.

Then the White Staff being delivered to the Lord High Steward by the Gentleman Usher of the Black Rod on his Knee, his Grace stood up uncovered, and holding the Staff in both his Hands, broke it in two, and declared the Commission to be dissolved; and then, leaving



leaving the Chair, came down to the Woolpack, and said, Is it your Lordships Pleasure to adjourn to the Chamber of Parliament?

*Lords.* Ay, ay.

*Lord High Steward.* This House is adjourned to the Chamber of Parliament.

Then the Peers, and others, returned back to the Chamber of Parliament in the same Order they came down, except that his Royal Highness the Duke of *Cumberland* walked after the Lord Chancellor.

## A P P E N D I X.

*Die Veneris, 19 Aprilis 1776.*

**O**RDERED by the Lords Spiritual and Temporal in Parliament assembled, that the following Questions be put to the Judges, *viz.*

- I. Whether a Sentence of the Spiritual Court against a Marriage in a Suit for Jactitation of Marriage is conclusive Evidence so as to stop the Counsel for the Crown from proving the said Marriage in an Indictment for Polygamy?
- II. Whether admitting such Sentence to be conclusive upon such Indictment, the Counsel for the Crown may be admitted to avoid the Effect of such Sentence, by proving the same to have been obtained by Fraud or Collusion?

Whereupon, *The Lord Chief Justice of the Court of Common Pleas*, having conferred with the Rest of the Judges present, delivered their unanimous Opinion upon the said Questions, with his Reasons, as follow, *viz.*

My Lords,

My Lord Chief Baron, and the Rest of my Brethren, have desired me to deliver their Answer to the Questions your Lordships have been pleased to propound to us.

That our Opinion may be the better understood, it is necessary to make some Observations on what has passed in Argument upon the Subject.

What has been said at the Bar is certainly true, as a general Principle, that a Transaction between Two Parties, in judicial Proceedings, ought not to be binding upon a Third; for it would be unjust to bind any Person who could not be admitted to make a Defence, or to examine Witnesses, or to appeal from a Judgment he might think erroneous; and therefore the Depositions of Witnesses in another Cause in Proof of a Fact, the Verdict of a Jury finding the Fact, and the Judgment of the Court upon Facts found, although Evidence against the Parties, and all claiming under them, are not, in general, to be used to the Prejudice of Strangers. There are some Exceptions to this general Rule, founded upon particular Reasons, but not being applicable to the present Subject, it is unnecessary to state them.

From the Variety of Cases relative to Judgments being given in Evidence in Civil Suits, these Two Deductions seem to follow as generally true. First, that the Judgment of a Court of concurrent Jurisdiction, directly upon the Point, is as a Plea, a Bar, or as Evidence, conclusive, between the same Parties, upon the same Matter, directly in Question in another Court. Secondly, that the Judgment of a Court of exclusive Jurisdiction, directly upon the Point, is, in like Manner, conclusive upon the same Matter, between the same Parties, coming incidentally in Question in another Court, for a different Purpose. But neither the Judgment of a concurrent or exclusive Jurisdiction is Evidence, of any Matter which came collaterally in Question, though within their Jurisdiction; nor of any Matter incidentally cognizable; nor of any Matter to be inferred by Argument from the Judgment.

Upon the Subject of Marriage, the Spiritual Court has the sole and exclusive Cognizance of questioning and deciding, directly, the Legality of Marriage; and of enforcing, specifically, the Rights and Obligations, respecting Persons, depending upon it; but the Temporal Courts have the sole Cognizance of examining and deciding upon all Temporal Rights of

Property;



Property; and, so far as such Rights are concerned, they have the inherent Power of deciding incidentally, either upon the Fact, or the Legality of Marriage, where they lie in the Way to the Decision of the proper Objects of their Jurisdiction; they do not want or require the Aid of the Spiritual Courts; nor has the Law provided any legal Means of sending to them for their Opinion; except where, in the Case of Marriage, an Issue is joined upon the Record in certain real Writs, upon the Legality of a Marriage, or its immediate Consequence, “ general Bastardy;” or, in like Manner, in some other particular Instances, lying peculiarly in the Knowledge of their Courts, as Profession, Deprivation, and some others; in these Cases, upon the Issue so formed, the Mode of trying the Question is by Reference to the Ordinary, and his Certificate, when returned, received, and entered upon the Record in the Temporal Courts, is a perpetual and conclusive Evidence against all the World, upon that Point; which exceptionable Extent, on whatever Reasons founded, was the Occasion of the Statute of the 9th of *Henry VI.* requiring certain public Proclamations to be made for Persons interested to come in, and be Parties to the Proceeding. But, even in these Cases, if the Ordinary should return no Certificate, or an insufficient one; or, if the Issue is accompanied with any special Circumstances, as if a Second Issue, triable by a Jury, is formed upon the same Record; or, if the Effect of the same Issue is put into another Form, a Jury is to decide, and not the Ordinary to certify, the Truth; and to this Purpose Sir *William Staunford* mentions a remarkable Instance. Bigamy was triable by the Bishop’s Certificate; but if the Prisoner, to avoid the Charge, pleads that the Second Espousals were null and void, because he had a former Wife living, this special Bigamy was not to be tried by the Bishop’s Certificate.

So that the Trial of Marriage, either as to Legality, or Fact, was not absolutely, and from its Nature, an Object *alieni fori*.

There was a Time, when the Spiritual Courts wished that their Determinations might, in all Cases, be received as authentic in the Temporal Courts; and in that solemn Assembly of the King, the Peers, the Bishops, and Judges, convened for the Purpose of settling the Demands of the Church, by *Edward the Second*, One of the Claims was expressed in these Words: “ *Si aliqua Causa, vel Negotium, cujus Cognitio spectat ad forum Ecclesiasticum, et coram ecclesiastico Judice fuerit sententialiter Terminatum, et transferit in Rem judicatum, nec per Appellationem fuerit suspensum; et postmodum, coram Judice Seculari, super eadem Re, inter easdem Personas, Quæstio moveatur, et provetur per Testes vel Instrumenta, talis Exceptio in foro seculari non admittatur.*” The Answer to which Demand was expressed in this Manner: “ *Quando eadem Causa, diversis rationibus coram Judicibus ecclesiasticis, et Secularibus, ventilatur, dicunt, quod (non obstante Ecclesiastico Judicio) Curia Regis ipsum tractet Negotium, ut sibi expedire videtur.*” For which Lord *Coke* gives this Reason, Second Institute, C. 22. “ For the Spiritual Judges Proceedings are for the Correction of the Spiritual Inner Man, and *pro Salute Animæ*, to enjoin him Penance; and the Judges of the Common Law proceed to give Damages and Recompence for the Wrong and Injury done,” and then adds, “ and so this Article was deservedly rejected.”

And the same Demand was made, and received the same Answer, in the Third Year of King *James the First*.

It is to be observed, that this Demand related only to Civil Suits between the same Parties; and that the Sentence should be received as a Plea in Bar. But this Attempt and Miscarriage did not prevent the Temporal Courts from shewing the same Respect to their Proceedings, as they did to those in other Courts. And therefore where, in Civil Causes, they found the Question of Marriage directly determined by the Ecclesiastical Courts, they received the Sentence, though not as a Plea, yet as Proof of the Fact; it being an Authority accredited in a judicial Proceeding by a Court of competent Jurisdiction; but still they received it upon the same Principles, and subject to the same Rules, by which they admit the Acts of other Courts.

Hence a Sentence of Nullity, and a Sentence in Affirmance of a Marriage, have been received as conclusive Evidence on a Question of Legitimacy arising incidentally upon a Claim to a real Estate.

A Sentence in a Cause of Jactitation has been received upon a Title in Ejectment, as Evidence against a Marriage, and, in like Manner in personal Actions, immediately founded on a supposed Marriage.

So a direct Sentence, in a Suit upon a Promise of Marriage, against the Contract, has been admitted as Evidence against such Contract, in an Action brought upon the same Promise



mise for Damages, it being a direct Sentence of a competent Court, disproving the Ground of the Action.

So a Sentence of Nullity is equally Evidence in a personal Action against a Defence founded upon a supposed Coverture.

But in all these Cases, the Parties to the Suits, or at least the Parties against whom the Evidence was received, were Parties to the Sentence, and had acquiesced under it; or claimed under those who were Parties, and had acquiesced.

But although the Law stands thus with regard to Civil Suits, Proceedings in Matters of Crime, and especially of Felony, fall under a different Consideration: First, because the Parties are not the same; for the King, in whom the Trust of prosecuting public Offences is vested, and which is executed by his immediate Orders, or in his Name by some Prosecutor, is no Party to such Proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine Witnesses, in any Manner intervene, or appeal. Secondly, such Doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial Cognizance in Matters of Crime, an immediate Influence in Trials for Offences, and to draw the Decision from the Course of the Common Law, to which it solely and peculiarly belongs.

The Ground of the judicial Powers given to Ecclesiastical Courts is, merely, of a Spiritual Consideration, *pro Correctione morum, et pro Salute Animæ*. They are therefore addressed to the Conscience of the Party. But one great Object of Temporal Jurisdiction is the public Peace; and Crimes against the public Peace are wholly, and in all their Parts, of Temporal Cognizance alone. A Felony by Common Law was always so. A Felony by Statute becomes so at the Moment of its Institution. The Temporal Courts alone can expound the Law, and judge of the Crime, and its Proofs; in doing so, they must see with their own Eyes, and try by their own Rules, that is, by the Common Law of the Land; it is the Trust and sworn Duty of their Office.

When the Acts of *Henry* the Eighth first declared what Marriages should be lawful, and what incestuous, the Temporal Courts, though they had before no Jurisdiction, and the Acts did not by express Words give them any upon the Point, decided, incidentally, upon the Construction, declared what Marriages came within the *Levitical* Degrees, and prohibited the Spiritual Courts from giving or proceeding upon any other Construction.

Whilst an ancient Statute subsisted (2 *H. IV.* 15.) by which personal Punishment was incurred on holding heretical Doctrines, the Temporal Courts took Notice, incidentally, whether the Tenet was heretical or not; for "the King's Courts will examine all Things or, "dained by Statute."

When the Statute of *W. III.* made certain blasphemous Doctrines a Temporal Crime, the Temporal Courts alone could determine, whether the Doctrine complained of was blasphemous so as to constitute the Crime.

If a Man should be indicted for taking a Woman by Force and marrying her; or for marrying a Child without her Father's Consent; or for a Rape, where the Defence is, that "the Woman is his Wife;" in all these Cases, the Temporal Courts are bound to try the Prisoner by the Rules and Course of the Common Law, and, incidentally, to determine what is heretical, and what is blasphemous; and whether it was a Marriage within the Statute; a Marriage without Consent; and whether, in the last Case, the Woman was his Wife: But if they should happen to find, that Sentences, in the respective Cases, had been given in the Spiritual Court upon the Heresy, the blasphemous Doctrines, the Marriage by Force, the Marriage without Consent, and the Marriage on the Rape; and the Court must receive such Sentences as conclusive Evidence, in the first Instance, without looking into the Case, it would vest the substantial and effective Decision, though not the Cognizance, of the Crimes, in the Spiritual Court, and leave to the Jury, and the Temporal Courts, nothing but a nominal Form of Proceeding, upon what would amount to a predetermined Conviction or Acquittal; which must have the Effect of a real Prohibition, since it would be in vain to prefer an Indictment, where an Act of a foreign Court shall, at once, seal up the Lips of the Witnesses, the Jury, and the Court, and put an intire Stop to the Proceeding.

And yet it is true, that the Spiritual Courts have no Jurisdiction, directly or indirectly, in any Matter not altogether Spiritual; and it is equally true, that the Temporal Courts have the sole and intire Cognizance of Crimes, which are wholly and altogether Temporal in their Nature.

And if the Rule of Evidence must be, as it is often declared to be, reciprocal; and that, in all Cases, in which Sentences, favourable to the Prisoner, are to be admitted as conclusive Evidence for him; the Sentences, if unfavourable to the Prisoner, are in like



Manner conclusive Evidence against him; in what Situation must the Prisoners be, whose Life, or Liberty, or Property, or Fame rests on the Judgment of Courts, which have no Jurisdiction over them in the Predicament in which they stand? and in what Situation are the Judges of the Common Law, who must condemn, on the Word of an Ecclesiastical Judge, without exercising any Judgment of their own?

The Spiritual Court alone can deprive a Clergyman: Felony is a good Cause of Deprivation: Yet in Lord *Hobart's* Reports it is held, that they cannot proceed to deprive for Felony, before the Felony has been tried at Law; and although, after Conviction, they may act upon That, and make the Conviction a Ground of Deprivation, neither Side can prove or disprove any Thing against the Verdict; because, as that very learned Judge declares, "it would be to determine, though not capitally, upon a Capital Crime, and thereby judge of the Nature of the Crime and the Validity of the Proofs; neither of which belongs to them to do."

If therefore such a Sentence, even upon a Matter within their Jurisdiction, and before a Felony committed, should be conclusive Evidence on a Trial for a Felony committed after, the Opinion of a Judge, incompetent to the Purpose, resulting (for aught appears) from incompetent Proofs (as suppose the Suppletory Oath) will direct, or rule, a Jury and a Court of competent Jurisdiction, without confronting any Witnesses, or hearing any Proofs: For the Question supposes, and the Truth is, that the Temporal Court does not and cannot examine, whether the Sentence is a just Conclusion from the Case, either in Law or Fact; and the Difficulty will not be removed by presuming, that every Court determines rightly, because it must be presumed too, that the Parties did Right in bringing the full and true Case before the Court; and if they did, still the Court will have determined rightly by Ecclesiastical Laws and Rules, and not by those Laws and Rules by which Criminals are to stand or fall in this Country.

If the Reason for receiving such Sentence is, because it is the Judgment of a Court competent to the Inquiry then before them; from the same Reason, the Determination of Two Justices of the Peace upon the Fact or Validity of a Marriage, in adjudging a Place of Settlement, may hereafter be offered as Evidence, and give the Law to the highest Court of Criminal Jurisdiction.

But if a direct Sentence upon the identical Question, in a Matrimonial Cause, should be admitted as Evidence (though such Sentence against the Marriage has not the Force of a final Decision, that there was none) yet a Cause of Jactitation is of a different Nature; it is ranked as a Cause of Defamation only, and not as a Matrimonial Cause, unless where the Defendant pleads a Marriage; and whether it continues a Matrimonial Cause throughout, as some say, or ceases to be so on Failure of proving a Marriage, as others have said, still the Sentence has only a negative and qualified Effect, *viz.* "That the Party has failed in his Proof, and that the Libellant is free from all Matrimonial Contract, *as far as yet appears;*" leaving it open to new Proofs of the same Marriage in the same Cause, or to any Proofs of That or any other Marriage in another Cause: And if such Sentence is no Plea to a new Suit there, and does not conclude the Court which pronounces, it cannot conclude a Court, which receives the Sentence, from going into new Proofs to make out That or any other Marriage.

So that admitting the Sentence in its full Extent and Import, it only proves, that it did not yet appear that they were married, and not, that they were not married at all: And, by the Rule laid down by Lord Chief Justice *Holt*, such Sentence can be no Proof of any Thing to be inferred by Argument from it; and therefore it is not to be inferred, that there was no Marriage at any Time or Place, because the Court had not then sufficient Evidence to prove a Marriage at a particular Time and Place. That Sentence, and this Judgment, may stand well together, and both Propositions be equally true; it may be true, that the Spiritual Court had not then sufficient Proof of the Marriage specified, and that your Lordships may now, unfortunately, find sufficient Proof of some Marriage.

But if it was a direct and decisive Sentence upon the Point, and, as it stands, to be admitted as conclusive Evidence upon the Court, and not to be impeached from within; yet, like all other Acts of the highest Judicial Authority, it is impeachable from without; although it is not permitted to shew that the Court was *mistaken*, it may be shewn that they were *mised*.

Fraud is an extrinsic collateral Act, which vitiates the most solemn Proceedings of Courts of Justice. Lord *Coke* says, it avoids all Judicial Acts, Ecclesiastical or Temporal.

In *Civil Suits* all Strangers may falsify, for Covin, either Fines, or real or feigned Recoveries; and even a Recovery by a just Title, if Collusion was practised to prevent a fair Defence;



Defence; and this, whether the Covin is apparent upon the Record, as not essoining, or not demanding the View, or by suffering Judgment by Confession or Default; or extrinsic, as not pleading a Release, collateral Warranty, or other advantageous Pleas.

In *Criminal Proceedings* if an Offender is convicted of Felony on Confession, or is outlawed, not only the Time of the Felony, but the Felony itself may be traversed by a Purchaser, whose Conveyance would be affected as it stands; and, even after a Conviction by Verdict, he may traverse the Time.

In the Proceedings of the *Ecclesiastical* Court the same Rule holds. In *Dyer* there is an Instance of a Second Administration, fraudulently obtained, to defeat an Execution at Law against the First; and the Fact being admitted by Demurrer, the Court pronounced against the fraudulent Administration. In another Instance an Administration had been fraudulently revoked; and the Fact being denied, Issue was joined upon it; and the Collusion being found by a Jury, the Court gave Judgment against it.

In the more modern Cases, the Question seems to have been, Whether the *Parties* should be permitted to prove Collusion; and not seeming to doubt but that Strangers might.

So that Collusion, being a Matter extrinsic of the Cause, may be imputed by a Stranger, and tried by a Jury, and determined by the Courts of Temporal Jurisdiction.

And if Fraud will vitiate the Judicial Acts of the Temporal Courts, there seems as much Reason to prevent the Mischiefs arising from Collusion in the Ecclesiastical Courts, which, from the Nature of their Proceedings, are at least as much exposed, and which We find have been, in Fact, as much exposed, to be practised upon for sinister Purposes, as the Courts in *Westminster Hall*.

We are therefore unanimously of Opinion:

First, That a Sentence in the Spiritual Court against a Marriage in a Suit of Jactitation of Marriage is not conclusive Evidence, so as to stop the Counsel for the Crown from proving the Marriage in an Indictment for Polygamy.

But Secondly, Admitting such Sentence to be conclusive upon such Indictment, the Counsel for the Crown may be admitted to avoid the Effect of such Sentence, by proving the same to have been obtained by Fraud or Collusion.

*Die Sabbati, 20<sup>o</sup> Aprilis 1776.*

ORDERED by the Lords Spiritual and Temporal in Parliament assembled, That the Lord Chief Justice of the Court of Common Pleas be, and he is hereby desired to, favour this House with a Copy of his Argument upon the Questions proposed to the Judges by this House Yesterday.

*Die Lunæ, 22<sup>o</sup> Aprilis 1776.*

ORDERED by the Lords Spiritual and Temporal in Parliament assembled, That the following Question be put to the Judges, *viz.*

Whether a Peeres convicted by her Peers of a Clergyable Felony is by Law intitled to the Benefit of the Statutes, so as to excuse her from Capital Punishment, without being burnt in the Hand, or being liable to any Imprisonment?



Whereupon, *the Lord Chief Baron of the Court of Exchequer*, having conferred with the rest of the Judges present, delivered their unanimous Opinion upon the said Question, with his Reasons, as follow, *viz.*

My Lords,

**T**HE Question proposed by your Lordships for our Opinion is,

Whether a Peerefs convicted by her Peers of a Clergyable Felony is by Law intitled to the Benefit of the Statutes, so as to excuse her from Capital Punishment, without being burnt in the Hand, or being liable to any Imprisonment?

My Lords, Your Lordships would probably expect, that on a Question of this Importance the Judges would have desired Time to have considered of it; but, as it was easy to foresee from the First Appointment of this Trial, that a Question of this Sort would probably arise, we have all looked into the several Statutes, from which any Light could be expected; and as on such a Consideration we have been able to form an Opinion, in which we all concur, we thought it our Duty to deliver it immediately, and not obstruct the publick Business by unnecessarily protracting this Trial, which has already taken up so much of your Lordships Time.

I am therefore authorized by my Brothers to say, we all concur in Opinion, that a Peerefs convicted by her Peers of a Clergyable Felony is by Law intitled to the Benefit of the Statutes, so as to excuse her from Capital Punishment, without being burnt in the Hand, or being liable to any Imprisonment.

My Lords, The Question depends on several Acts of Parliament; the First I shall trouble your Lordships with, is the 29 *Hen. VI. c. 9*, which recites, “ that by *Magna Charta* no Freeman shall be taken, or imprisoned, or disseised of his Freehold, or his Liberties or free Customs, or shall be outlawed, or in any wise destroyed, that is, forejudged of Life or Limb, or put to Death, or shall be condemned at the King’s Suit, either before the King in his Bench, that is, the King’s Bench, or before any other Commissioner or Judge whatsoever, but by the lawful Judgment of his Peers, or by the Law of the Land; in which Statute, that is, *Magna Charta*, no Mention is made how Women, Ladies of great Estate in respect of their Husbands Peers of the Land, married or sole, that is to say, Duchesses, Countesses, or Baroneses, shall be put to answer, or before what Judges that they shall be judged upon Indictments of Treasons or Felonies by them committed or done; in regard whereof it is a Doubt in the Law of *England*, before whom and by whom such Ladies so indicted shall be put to answer and be judged: Our said Lord the King, willing to put out such Ambiguities and Doubts, hath declared by Authority aforesaid, that such Ladies so indicted, or hereafter to be indicted, of any Treason or Felony by them done or hereafter to be done, whether they be married or sole, that they thereof shall be brought to answer, and put to answer and judged before such Judges and Peers of the Realm, as Peers of the Realm should be if they were indicted or impeached of such Treasons or Felonies done or hereafter to be done, and in like (*autiel*) Manner and Form, and none otherwise.”

Your Lordships will observe, that this Statute does not introduce a new Law, but is a declarative Law, explaining what the true Meaning of *Magna Charta* was. Peers in that Statute means Equals; and therefore any of the Nobility must by *Magna Charta* be tried by the Nobility who are their Peers; for all Nobility, whether Barons the lowest, or Dukes the highest, Degree of Nobility, are all Equals in this Respect: And Lord *Coke*, 2 *Inst.* 45, says, “ Though Duchesses, Countesses, and Baroneses are only named in this declaratory Statute, and Marchionesses and Viscountesses are omitted, notwithstanding, they are also comprehended in this 29th Chapter of *Magna Charta*.”

Peers, though originally meaning only Equals, is now by common Use applied to a particular Part of the Nation, distinguished from the rest by superior Rank and Privileges, which they derive from the King originally by Writ or Letters Patents granted to them or their Ancestors; and in Cases of such Ladies as are not so ennobled, they obtain that Nobility by Marriage to those who are so ennobled.

As the next Statute, 1 *E. VI. c. 12, s. 14*, speaks of the Benefit of Clergy, it will be necessary to say something upon that Subject. Lord *Hale*, in his Second Volume of his

History



History of Pleas of the Crown, Page 323, says, that “anciently Princes and States converted to Christianity granted the Clergy Exemptions of Places consecrated to Religious Duties from Arrests for Crimes, which was the Original of Sanctuaries; and Second, Exemptions of their Persons from Criminal Proceedings in some Cases capital before secular Judges, which was the true Original of this *Privilegium Clericale*. The Clergy increasing in Wealth, Power, Honour, Number, and Interest claimed as a Right what they at first obtained by the Favour of Princes and States, and by degrees extended these Exemptions to all that had any Kind of subordinate Ministration relative to the Church.”

These Exemptions never rose to so great an Heighth in this Kingdom as in other Places; and therefore the Clergy were not exempted here from Civil Suits, nor was this *Privilegium Clericale* allowed in the lowest Crimes not Capital, nor wherein they were not to lose Life or Limb, nor in High Treason touching the King himself, or his Royal Majesty: But by 25 E. III. c. 4, *de Clero*, in all other Felonies the Ordinary might demand the Prisoner as a Clerk, or the Prisoner himself might demand the Benefit of the Clergy. The Canon Law gave the Privilege only to Men in Holy Orders: Our Law, in Favour to Learning and the Desire of the *English* Bishops, extended to Lay Clerks, *i. e.* any Layman, that by reason of his Ability to read was in a Possibility of being made a Priest. C. J. Treby, State Trials, Vol. V. 171. The Means of trying, whether he was intitled to it, was by Reading: If he could read, he was delivered to the Ordinary, that is, the Bishop, or the Person who had ordinary Jurisdiction there; but the Ordinary was so much the Minister of the Temporal Courts, and so subordinate to them, that if the Ordinary refused to let the Prisoner read, the Temporal Court could controul, and order a Book to be delivered to him; and if the Ordinary said he could read when he could not, or *vice versa*, that he could not read when in Reality he could, the Temporal Courts gave Judgment according to the Truth of the Case; and those Courts likewise directed, whether the Prisoner should be delivered to the Ordinary with Purgation, or without Purgation: In the last Case they were to be kept in the Ordinary's Prison for Life. If delivered with Purgation, then the Ordinary tried him for the Fact, whereof he was accused, by a Jury of Twelve Clerks; and if he was acquitted, as was generally the Case, he was discharged out of Prison. Purgation was the Convict's clearing himself of the Crime by his own Oath, and the Oaths or Verdict of an Inquest of Twelve Clerks as Compurgators. The Proceeding was before the Ordinary; and old Books speak of their making Proclamation for Persons to come in against his Purgation, and of their enquiring into his Life, Conversation, and Fame, and of other Formalities; in all which, several Statutes say, there were great Abuses.

The Statute 4 H. VII. c. 13, reciting that “upon Trust of the Privilege of the Church divers Persons have been the more bold to commit Murder, Rape, Robbery, Theft, and all other mischievous Deeds, because they have been continually admitted to the Benefit of the Clergy, as oft as they offended:” It enacts, that “every Person not being within Orders, which hath once been admitted to the Benefit of his Clergy, being again arraigned of any such Offence, be not admitted to have the Benefit or Privilege of the Clergy; and that every Person so convicted for Murder (which was then a Clergyable Offence) should be marked with an M on the Brawn of the left Thumb; and if he be for any other Felony, to be marked with a T in the same Place of the Thumb; and those Marks to be made by the Gaoler openly in the Court before the Judge, before that such Person be delivered to the Ordinary.”

This Statute prevented Laymen having their Clergy more than once; and the Branding answered the Purpose of discovering, whether they had the Benefit of their Clergy before, though it was necessary to prove it by other Means, to prevent their having Clergy a Second Time.

The 1 E. VI. c. 12, will come next to be considered; which, after repealing several new-created Treasons and Felonies, and taking away Clergy in several other Felonies, in Sec. 14, enacts, that “in all and every Case, where any of the King's Majesty's Subjects shall and may, upon his Prayer, have the Privilege of Clergy as a Clerk Convict that may make Purgation; in all these Cases and every of them, and also in all and every Case and Cases of Felony, wherein the Privilege and Benefit of Clergy is restrained, excepted, or taken away by this Statute (wilful Murder and poisoning of Malice prepensed only excepted) the Lord and Lords of the Parliament, and Peer and Peers of the Realm, having Place and Voice in Parliament, shall by virtue of this present Act, of Common Grace, upon his or their Request or Prayer, alledging that he is a Lord or Peer of this Realm, and claiming the Benefit of this Act, though he cannot read, without any



“ Burning in the Hand, Loss of Inheritance, or Corruption of his Blood, be adjudged, deemed, taken, and used, for his first Time only, to all Intents, Constructions, and Purposes as a Clerk Convict, and shall be in Case of a Clerk Convict which may make Purgation, without any further or other Benefit or Privilege of Clergy to any such Lord or Peer from thenceforth at any Time after for any Cause to be allowed, adjudged, or admitted; any Law, Statute, Usage, or Custom, or any other Thing to the contrary notwithstanding: Provided always, that if any of the said Lords of the Parliament, or any of the Peers of this Realm for the Time being, shall fortune to be indicted of any of the Offences limited in this Act, that then they and every of them shall have his or their Trial by their Peers, as it hath been used heretofore in Cases of Treason.”

From the Time of this Statute, whenever a Peer has been convicted of any Felony, for which a Commoner might have the Benefit of Clergy, such Peer, on praying the Benefit of this Statute, has always been discharged without burning or delivering to the Ordinary: And there are a Series of Precedents from Lord *Morley's* Case, 1666, till one in this Reign as late as 1765; and C. J. *Treby* says, “ the Statute 1 *E. VI.* exempts the Peers convict of Clergyable Felonies from Burning in the Hand, and virtually repeals the Statute, 4 *H. VII.* as to so much; and the Statute 18 *Eliz.* requires Burning in the Hand only according to the Statute in that Behalf before provided: And there being no Statute then or now in Force to subject Peers to such Brand, they are in such Case (upon the allowing the Benefit of the said Statute of *E. VI.* which is as much as Clergy without Reading or Burning) freed from Discredit and other Penalties of the Felony, as much as Commoners are by having Clergy formally allowed, and being burnt. *State Trials*, Vol. V. 170.” And he says, “ a Peer shall have this Benefit without either Clergy or Burning, a Clerk in Orders upon Clergy alone without Burning, and a Lay Clerk not without Clergy and Burning. *Ib.* 172—3.” And I believe no Body can dispute but the Law is so. The Question therefore is, Whether a Peeress is not entitled to the same Privilege? and we are of Opinion that she is.

Peers is a Word capable of including the whole Body of the Peerage, Females as well as Males; and every personal Privilege conferred on Peers is by Operation of Law communicated to Peeresses, whether by Blood or Marriage, though only Males are mentioned. As Trial by Peers, though only recognized in *Magna Charta*, as belonging to the Male Sex, *nec super eum ibimus, nec super eum mittemus*, did by Construction of Law belong to Females, as appears by 20 *H. VI.* which is only a declaratory Law: So any other personal Privilege, granted or confirmed to Peers generally, is communicated to Females, if it is of a Nature capable of being communicated to and enjoyed by them; as Trial by Peers, Freedom from Arrest: Countess *Rutland's* Case: *Moor* 769, and 2 *Co.* 52. And if those Privileges are so communicated, as they certainly are, why should not this given by 1 *E. VI.* the Consequence of which is so reasonable and agreeable to Justice, that a Female Offender shall not undergo a greater Punishment, than a Male of her own Rank would do for a Crime of the same Sort? But it was insisted at the Bar, that between 1 *E. VI.* and 18 *Eliz.* a Peer found guilty of a Clergyable Offence should be delivered to the Ordinary as a Clerk Convict: And *Staunford*, 130, is quoted for that Purpose, that by the Words of this Statute a Peer ought to make his Purgation; and if so, he ought to be delivered to the Ordinary to be kept till he has made his Purgation. That Opinion of *Staunford* seems contrary to Law in many Particulars. The 1 *E. VI.* c. 3, had in Effect suspended Purgation, even as to Commoners: Therefore the Legislature could never mean to introduce and establish Purgation as to a Peer, which *Hobart* says, 289, “ is no Ordinance of the Common Law, but is a Practice among themselves, *i. e.* the Clergy, rather overseen and winked at than approved by the Common Law:” And Page 291, he says, “ the Perjuries were sundry in the Witnesses and Compurgators, in the Jury of Clerks, and the Judge himself was not clear, all turning the solemn Trial of Truth by Oath into a ceremonious and formal Lie.” It is not probable the Parliament, intending a great Distinction in Favour of Peers, so as to dispense with Reading and Burning in the Hand, meant to leave a Peer a Prisoner in the Custody of the Ordinary, and to have his Credit and Capacity to acquire personal Property, and enjoy the Profits of his Lands, to be decided upon in such a mock Trial; and in Fact there is no Instance in any of the Law Books, where a Peer convicted of a Clergyable Felony has ever been delivered to the Ordinary, or has made Purgation: And the Jurisdiction of the Ordinary to purge the Clerk only relates to Clerks in Orders, or such as the Common Law considered as Clerks; and a Peer not being a Clerk he could not make Purgation; the Ordinary having no Jurisdiction over him; and the Words here, “ have the Privilege of Clergy as a Clerk Convict that may make Purgation, and



“ shall be adjudged, deemed, taken, and used for his First Time only to all Intents, Con-  
 “ structions, and Purposes as a Clerk Convict, and shall be in Case of a Clerk Convict  
 “ which may make Purgation,” do not import or direct that he shall make Purgation;  
 but give a Peer the same Advantage as a Clerk Convict who might make Purgation,  
*i. e.* an absolute Discharge from all further Punishment; and the Statute, as to him, is to  
 be construed to be a Pardon: And it seems most probable, that Peers never did make Pur-  
 gation; because, as all who made Purgation were to be tried by a Jury of Clerks, such  
 Trial would be derogatory to their inherent Privilege of being tried by their Peers. Lord  
 Chief Justice *Hale*, on this Statute (2 *H. H. P. C.* 376) says, I think, “ it was never  
 “ meant that a Peer of the Realm should be put to read, or be burnt in the Hand, where a  
 “ common Person should be put to his Clergy;” neither is it said, that he shall be discharged  
 by his praying of the Benefit of this Statute, where a common Person shall have the Privilege  
 of Clergy, and may make his Purgation; but only where he may have the Benefit of his  
 Clergy in the First Clause of the Statute: The other Clause (shall be in case of a Clerk Con-  
 vict that may make Purgation) is only for his speedier Discharge, and farther Advantage,  
 and not to restrain the general Clause. But it is objected, that the Statute 1 *E. VI.* c. 12, gives  
 this Privilege only to “ Lord and Lords of the Parliament, and Peer and Peers of the  
 “ Realm having Place and Voice in the Parliament;” and that a Peeres, not having  
 Place and Voice in Parliament, cannot have the Benefit of this Statute: This Expression,  
 “ having Place and Voice in Parliament,” cannot mean to exclude all Peers but such as sat  
 in Parliament; but to describe some of the Incidents of Peerage, or to include Bishops,  
 who are Lords of Parliament though not Peers; and if these Words should confine the Be-  
 nefit of this Statute to those only who actually sat in Parliament, it would exclude Peers  
 Minors, and Papist Peers, who, by Statute 30 *Car. II.* Stat. 2. c. 1, are now rendered in-  
 capable of sitting or voting in Parliament: The Words therefore are merely descriptive,  
 and not restrictive: And what makes it very plain is, that, in the 4th and 5th *P.* and  
*M.* c. 4, which takes away Clergy from Accessaries before the Fact in Murder and several  
 other Offences, there is a Proviso that every Lord and Lords of the Parliament and Peer  
 and Peers of this Realm, having Place and Voice in Parliament, upon every Indictment  
 for any of the Offences aforesaid, shall be tried by their Peers, as hath been accustomed by  
 the Laws of this Realm: Here are the very Words used in 1 *E. VI.* c. 12; yet it could never  
 be doubted, but notwithstanding those Words, Peeres must be tried by their Peers for  
 Offences against that Statute; and Lady *Somerset* was tried by her Peers for being accessary  
 to the Murder of Sir *Thomas Overbury*, which was an Offence against that very Statute:  
 What gave Rise probably to this Statute, 1 *E. VI.* c. 12, was another Statute passed the  
 same Year, c. 3, providing for the Punishment of Vagabonds by making them Slaves for  
 Two Years; in which Act was a Clause, that no Clerk Convict shall make his Purgation, but  
 shall be a Slave for One Year to him, who will become bound with Two Sureties to the Or-  
 dinary to take him into his Service, and he shall be used like a Vagabond; and a Clerk at-  
 tainted or Convict, which by Law cannot make his Purgation, may by the Ordinary be de-  
 livered to any Man, who will give Security to keep him as his Slave for Five Years; and it  
 shall be lawful to every Person, to whom any shall be adjudged a Slave, to put a Ring of Iron  
 about his Neck, Arm, or Leg. To avoid all possible Question whether a Peer could be  
 subject to any of these Provisions, this Act 1 *E. VI.* c. 12, provides for their immediate  
 Delivery, on praying the Benefit of this Statute: This Statute 1 *E. VI.* c. 3, was repealed  
 3d and 4th *E. VI.* c. 16, but was in Force when 1 *E. VI.* c. 12, was made. The next Sta-  
 tute, 18 *Eliz.* c. 7, provides, that every Person which shall be admitted and allowed to have  
 the Benefit of Privilege of his Clergy, shall not thereupon be delivered to the Ordinary, as  
 has been accustomed; but, after such Clergy allowed and burning in the Hand, according to  
 the Statute in that Behalf provided, shall forthwith be enlarged and delivered out of Prison  
 by the Justices, before whom such Clergy shall be granted, that Cause notwithstanding: Then  
 follows the Proviso, that the Justices, before whom any such Allowance of Clergy shall be  
 had, shall and may, for the further Correction of such Persons to whom Clergy shall be al-  
 lowed, detain and keep them in Prison for such convenient Time as the same Justices in their  
 Discretions shall think convenient, so as the same do not exceed One Year’s Imprisonment:  
 This Proviso plainly relates only to those Persons mentioned in the Clause, that is, *such*  
 Persons as had been burnt in the Hand according to the Statute in that Case made and pro-  
 vided, meaning 4 *H. VII.* As Peers therefore are not to be burnt in the Hand, they cannot  
 be imprisoned; for those only are to be imprisoned who have been burnt in the Hand; and  
 the Word, Justices, is more properly applicable to other Courts of Judicature than to this  
 House. The 21 *Ja. I.* c. 7, cannot relate to this Question, for it relates to common Per-  
 sons,



sons, and was intended to put Women on the same Footing with Men, as to small Larcenies; and 3d and 4th *W. and M. c. 9*, does the same in all Clergyable Felonies: This shews the Justice of allowing to the Peeres the same Benefit of 1 *E. VI. c. 12*, as Peers have; and it is natural to suppose, that when the Legislature were putting Women of inferior Rank on the same Footing as Men, they would have put Peeres on the same Footing with Peers, had it not been conceived that the same Privileges were already extended to both.

Upon the Whole therefore, by Stat. 1 *E. 6*, a Peer convicted of a Clergyable Felony is intitled to his immediate Discharge, without Reading or Burning in the Hand, or being liable to Imprisonment by 18 *Eliz.*

This Privilege, given by Statute, being such as may be enjoyed by a Peeres, is by Operation of Law communicated to her, and puts her in the same Situation as a Peer; the Consequence of which is, that a Peeres, convicted of a Clergyable Felony, praying the Benefit of this Statute, is not only excused from capital Punishment, but ought to be immediately discharged, without being burnt in the Hand, or liable to any Imprisonment.

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T H E E N D